87-622
No.

In The

Supreme Court of the United States

October Term, 1987

VALLEY LIQUORS, INC., an Illinois corporation,

Petitioner,

vs.

RENFIELD IMPORTERS, LTD.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Seventh Circuit's decision represents a continued failure to adhere to this Court's settled precedent in the areas of antitrust law and summary judgment practice, requiring the exercise of this Court's supervisory powers.

2. Whether summary judgment is appropriate in a case asserting claims under the Sherman Anti-Trust Act, 15 U.S.C. §§ 1 *et seq.*, when plaintiff and defendant each present affidavits of expert economists who assert diametrically opposed opinions on ultimate issues of fact such as market power and conspiracy, plaintiff offers additional evidence which, if accepted, establishes a *prima facie* case, and summary judgment for defendant resulted in part from a finding that the defendant's proffered explanation for its conduct was "plausible."

3. Whether, consistent with this Court's holding in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), an antitrust plaintiff who, in response to a motion for summary judgment, has offered evidence excluding all possible rational business objectives for a defendant's conduct (including theoretical business objectives never articulated by the defendant), can be charged with the additional burden of disproving the possibility that the defendant's decision to terminate its lowest-priced and best distributor following pricing complaints from that distributor's competitors resulted from defendant's error in judgment.

4. Whether, in a Rule of Reason case, the plaintiff must prove defendant's market share in a defined market, where plaintiff establishes by expert and other evidence

the defendant's market power by virtue of its ability to raise its prices above the competitive level without losing all its sales as well as the actual detrimental impact of defendant's restraint of trade on competition.

PARTIES TO THE PROCEEDINGS

Petitioner, Valley Liquors, Inc., an Illinois corporation with no parent or subsidiary corporations, brought this action, naming Renfield Importers, Ltd., a New York corporation, as the sole defendant. There are no other parties to these proceedings.

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OPINIONS BELOW

This case was brought in the United States District Court for the Northern District of Illinois. On December 31, 1985, the Honorable John F. Grady of that court issued a memorandum opinion and entered judgment in favor of respondent on respondent's motion for summary judgment. The district court opinion is unreported and is included in the Appendix to this Petition. (App. 31-44.) On June 3, 1987, the United States Court of Appeals for the Seventh Circuit affirmed the district court, and plaintiff's timely Petition for Rehearing, With Suggestion for

Rehearing In Banc, was denied July 13, 1987. *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 822 F.2d 656 (7th Cir. 1987). That opinion has been included in the Appendix to this Petition (App. 1-29).

JURISDICTIONAL STATEMENT

The Seventh Circuit issued its Opinion June 3, 1987. A timely Petition for Rehearing, With Suggestion for Rehearing In Banc, was filed June 17, 1987 and denied on July 13, 1987. This Petition for a Writ of Certiorari was filed within ninety days of the denial of the Petition for Rehearing. Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Counts I and II of petitioner's amended complaint asserted claims under § 1 of the Sherman Anti-Trust Act, 15 U.S.C. § 1, which provides in pertinent part as follows:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal . . . ."

The full text of Section 1 is set forth in the Appendix to this Petition (App. 46).

STATEMENT OF THE CASE

A. Nature Of The Case

Petitioner Valley Liquors, Inc. ("Valley") brought suit against respondent Renfield Importers, Ltd. ("Renfield") for violation of the Sherman Anti-Trust Act, 15 U.S.C. §§ 1 *et seq.*, and for breach of Valley's distributorship agreement with Renfield. The district court's subject matter jurisdiction was invoked pursuant to 28 U.S.C. §§ 1331 and 1337 with respect to the antitrust claims and 28 U.S.C. § 1332 with respect to the breach of contract claim. Valley serves as a wholesale distributor of alcoholic beverages, including distilled spirits and wines, in various counties in northern Illinois. Respondent Renfield is an importer of distilled spirits and wines and sells its products to wholesale distributors who, in turn, sell the alcoholic beverages to retailers.

Prior to November, 1981, Valley was one of Renfield's wholesale distributors in various counties in northern Illinois, including all of DuPage and McHenry counties and portions of Cook County, Illinois. On October 22, 1981, Renfield advised Valley that, effective November 1, 1981, Valley would be discontinued as a wholesale distributor in DuPage, McHenry and Cook counties and would no longer be authorized to sell Renfield products to retailers in those counties.

Valley commenced this action November 10, 1981. Count I of Valley's amended complaint alleged the existence of a conspiracy among Valley's competitors and Renfield to terminate Valley as Renfield's distributor in an effort to restrain price competition. Count II alleged that Renfield's decision to terminate Valley as its wholesale distributor violated the Sherman Anti-Trust Act as an illegal vertical

territorial restriction and an unreasonable restraint of trade. Count III alleged that Renfield's decision to terminate Valley as its distributor upon only ten days' notice constituted a breach of contract.

B. Course Of Proceedings And Disposition Below

On February 10, 1983, Renfield filed its Motion for Summary Judgment (R. 36). On June 2, 1983, Valley filed its Amended Complaint, and, thereafter, the parties concluded discovery and briefed the motion for summary judgment. (R. 59, 64, 71, 75, 80).

On December 31, 1985, the district court entered an order granting Renfield's motion for summary judgment and entering judgment in favor of Renfield and against Valley on all three counts of the Amended Complaint (R. 97 and 98). The district court found that there existed no genuine issues of material fact with respect to concerted activity among Renfield and Valley's competitors to terminate Valley as Renfield's distributor in an effort to restrain competition. In addition, the court held that there was no question of fact concerning the absence of Renfield's market power. Further, the court concluded that Renfield's termination of Valley as its distributor did not impair competition and that Renfield's termination of Valley was made in good faith and, therefore, did not constitute a breach of its distributorship agreement with Valley.

Valley appealed the district court's order, and the Seventh Circuit Court of Appeals affirmed. *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 822 F.2d 656 (7th Cir. 1987). Valley's Petition for Rehearing, With Suggestion for Rehearing in Banc, was denied July 13, 1987.

In affirming the district court, the court of appeals found that (1) Valley failed to offer evidence sufficient to create

a genuine issue of material fact with regard to the existence of a conspiracy among Renfield and Valley's competitors to fix prices, because Valley's attempt to prove the absence of independent business motivations underlying Renfield's conduct failed to exclude the possibility that Renfield merely exercised bad business judgment when it terminated Valley; (2) Valley failed to raise an issue of fact regarding Renfield's market power in a relevant market, given Renfield's market share, and could not overcome that burden by offering proof of detrimental effects on competition resulting from Renfield's restraint of trade; and (3) under Illinois law, Renfield's termination was made in good faith with sufficient notice to Valley.

C. Statement Of Facts

1. The Parties

Valley is a wholesale distributor of alcoholic beverages (R. 45, ¶2). Renfield, a New York corporation maintaining its principal place of business in New York, New York, is an importer and national distributor of various brands of distilled spirits and wines (*Id.*, ¶3), including Gordon's Vodka, Gordon's Gin, Giacobazzi wine, Martini & Rossi Vermouth, Haig & Haig Five Star scotch and Piper Heidseick Champagnes (R. 64). Prior to November 1, 1981, Valley served as Renfield's distributor in various counties in northern Illinois, including all of McHenry and DuPage counties and portions of Cook County, Illinois, where a majority of its sales took place. (R. 45, ¶8). Valley's competitors in the distribution of Renfield's products to retailers in these counties were Romano Brothers Beverage Co. ("Romano") and Continental Distributing Company ("Continental") (*Id.*, ¶7).

Among Renfield's wholesale distributors in the Chicago metropolitan area, Valley was considered by Renfield to

be its "best" distributor (R. 19, p. 11). Prior to its termination as a Renfield distributor, Valley consistently sold Renfield's products to retailers at prices lower than those of other wholesale distributors, averaging approximately 5% below the prices at which Renfield's other wholesale distributors sold Renfield products. (R. 59, pp. 9 and 10, ¶25; R. 20, p. 101).

The record shows that the sole form of competition among Renfield's Chicago-area wholesale distributors in connection with the sale of Renfield's products to retailers was price competition (R. 59, pp. 21-24, ¶¶49, 53, 59, 60; R. 49, pp. 24, 26, 88, 92-93 and 96). With respect to Valley's point-of-sale merchandising at the retailers' places of business, Renfield's executives acknowledged that Valley, at all relevant times, satisfactorily met Renfield's expectations in that regard. (R. 59, p. 23, ¶54; R. 49, p. 120).

In the opinion of Renfield's General Credit Manager, Valley's credit history with Renfield was good. (R. 59, p. 25, ¶62; R. 60, p. 11). Romano had a credit history "about the same as Valley's" but, in the opinion of Renfield's General Credit Manager, Romano was "under capitalized" (R. 59, p. 25, ¶62; R. 60, pp. 12, 13). Continental's credit history was "less satisfactory" than Valley's (R. 59, p. 25, ¶62; R. 60, p. 20).

2. The Termination Of Valley

In July, 1981, Renfield conducted separate meetings with the representatives of Valley, Romano and Continental (R. 19, pp. 45-48). At those meetings, held at the Continental Plaza Hotel in Chicago, Renfield suggested that it was contemplating a "realignment" of its Illinois wholesale distributors (*Id.*, p. 46). At that time, Continental had the exclusive right to sell Gordon's Vodka in those portions of Cook County not served by Valley. (*Id.*, p.

61). At that time, Romano had no right to sell Gordon's Vodka (*Id.*, p. 18), but it had the exclusive right to act as Renfield's distributor of Giacobazzi wines (*Id.*, p. 50). At the time of the July, 1981 meetings, Continental, through its President, advised Renfield that it would be "very unhappy" if it lost the right to remain as Renfield's exclusive distributor of Gordon's Vodka in Cook County (*Id.*, p. 48).

In October, 1981, Renfield advised its distributors of its proposed changes in the distributors' rights. Renfield advised Romano that, although Romano would lose the right to remain as Renfield's exclusive distributor of Giacobazzi wines, it would gain the right to sell other Renfield brands, and it would become the exclusive distributor of Renfield's Sonoma Wines (*Id.*, p. 50). Continental was informed that it would no longer be the exclusive distributor of Gordon's Vodka in Cook County and would no longer distribute Renfield's Piper Heidseick Champagne, Henkell Sparkling Wines and Sonoma Wines (*Id.*, pp. 25, 26).

When informed of Renfield's decision to withdraw its right to serve as the exclusive distributor of Gordon's Vodka in Cook County, Continental's president (who did not then know that Valley would be discontinued in the counties affected) declared Renfield's proposal "unacceptable" and insisted upon a meeting with Renfield's chief executive (*Id.* at 55). After his meeting in New York with Renfield's President, however, Continental's President accepted Renfield's realignment. Upon Continental's acceptance of Renfield's proposed realignment, Renfield advised Valley of its termination as a Renfield distributor in DuPage, McHenry and Cook counties (*Id.*, pp. 84-85). Prior to November, 1981, and for many years prior thereto, Valley sold approximately $3 million worth of Renfield products annually to retail outlets in DuPage, McHenry and Cook counties (R. 20, p. 95).

Prior to Valley's termination as a Renfield distributor in the aforementioned counties, Renfield had received complaints from Continental and Romano concerning Valley's pricing policies. Both Continental and Romano complained to Renfield's Central Division Manager that the Renfield line was not profitable and that they were not making enough money selling Renfield's products (R. 59, pp. 6, 7, ¶19). In this connection, both Continental and Romano requested that Renfield give their respective distributorships the exclusive right to sell Renfield's products, and to thus enable them to have complete control over prices to retailers without the need to meet competitive prices. (R. 59, p. 7, ¶20). Both Continental and Romano complained to Renfield that Valley sold Renfield's products at too low a price (R. 59, pp. 7-8, ¶¶21-24; R. 89, pp. 39, 82).

3. Reasons Proffered For Valley's Termination

The record shows that, in deciding to terminate Valley as its distributor in McHenry, DuPage and Cook Counties, Illinois, Renfield did not seek to enhance any aspect of non-price competition among Valley, Continental, Romano or any other distributor entitled to sell Renfield products. Renfield was not aware of whether those distributors even engaged in non-price competition.

In the course of discovery, Valley propounded interrogatories to Renfield requesting a description of all aspects of non-price intrabrand competition which Renfield had "hoped to or anticipated to enhance as a result of its realignment of distributorships in Illinois." In its three sets of responses to Valley's Interrogatory, Renfield failed to identify any aspect of non-price intrabrand competition (such as provision of pre-sale services to retailers) it sought to enhance or which was enhanced as a result of the elimination of Valley. (R. 39, pp. 3, 6; R.

59, pp. 14, 15-17, ¶¶36, 37, 38; R. 46, pp. 2-5, ¶7). In addition, Renfield, through its employees, acknowledged that Valley was at least the equal of Renfield's other wholesale distributors in terms of non-price competition (R. 59, p. 17, ¶42), and Renfield's Chicago area sales executives testified that the decision to terminate Valley's distributorship rights was not an effort to affect delivery policies (R. 59, p. 18, ¶43).

Renfield executives also testified that Valley properly performed its services with respect to point-of-sale merchandising (R. 59, p. 19, ¶44). Finally, Renfield's Chicago area manager acknowledged that Valley and Continental were a "step above" Renfield's other wholesale distributors with respect to delivery to retailers (R. 59, p. 19, ¶45), and that there were no aspects of non-price competition with respect to which Valley was inferior to other wholesale distributors of Renfield (R. 59, p. 19, ¶46).

With respect to the "free rider" issue, Ponti Campagna (Renfield's National Sales Manager and the man responsible for deciding to terminate Valley) and his assistant, Lawrence Perry, testified at their depositions that Valley had not been terminated because it had been a "free rider" (R. 59, p. 34, ¶69; R. 89, pp. 86-88; R. 59, pp. 26-33, ¶¶63-66; R. 60, pp. 52, 61-62, 79-84). Perry further acknowledged at his deposition that, in deciding to terminate Valley as Renfield's distributor in the geographical market affected, Renfield did not consider Valley's inventory practices, the extent to which Valley distributed a complete portfolio of Renfield's products in terms of sizes and brands, the extent to which Valley adequately merchandised Renfield's products with point-of-sale materials, whether Valley maintained adequate delivery services, the adequacy of Valley's warehouse facilities, or the quality of Valley's sales staff (R. 59, pp. 28-32, ¶65; R. 60, pp. 52, 61-62).

4. Effect Of Termination Upon Price Competition

Prior to its termination as a Renfield distributor, Valley had sold Renfield's products at an average price 5% below the prices at which Renfield's other wholesale distributors were offering Renfield's products to retailers (R. 20, p. 101). During the time immediately prior to Valley's termination as a wholesale distributor, Renfield experienced intense price competition among its distributors in the Chicago area for the sale of Renfield's products (R. 59, p. 34, ¶70; R. 89, pp. 91-93). Campagna described the extent of the price competition among Renfield's Chicago area distributors as follows:

> [November] isn't the ideal time to move, the holiday season, but it was just my judgment that the situation was going to get worse; the distributors were undercutting each other in prices, and it was an unhealthy situation.
>
> * * *
>
> So what I couldn't understand was distributors who were hollering to me they didn't make any money on the line, and yet they were, basically it was on gin or vodka, not on the balance of the portfolio, they were trying to beat everybody's deal; and I couldn't let it go on. I mean, the consumer was benefitting obviously if—although you never know with the discounts whether they're passed on to the consumer or not, whether the retailer keeps the extra discount or passes it on in an ad.
>
> * * *
>
> First of all, I could see the discount patterns. I got complaints from the distributors saying this guy is giving this away, this guy is giving this away.
>
> * * *
>
> I have competition in the marketplace. Let's say that my products get real cheap. Now this borders on antitrust. I can't control the market, but if it goes down in the marketplace, they will come to me and say, "why does it happen?"

(R. 59, pp. 34-36, ¶70; R. 89, pp. 37-39, 91-93). Subsequent to Valley's termination as a distributor, the intense price competition was curtailed, and the prices quoted by distributors for the sale of Renfield's products to retailers stabilized (R. 59, pp. 36, 37, ¶71; R. 89, p. 93).

5. Effect Of Valley's Termination Upon Interbrand Competition

In the course of discovery, Renfield produced copies of its "depletion reports," which describe the volume of cases sold by Renfield to its distributors in Illinois. These depletion reports were filed with the district court as part of Valley's response to Renfield's motion for summary judgment (R. 64).

Renfield's depletion reports establish that Renfield's total sales of all products throughout the metropolitan Chicago area decreased from 472,941 cases sold in the fiscal year ending March 31, 1981 (the last complete fiscal year prior to Valley's termination), to 383,231 cases the following year and only 371,994 cases in the fiscal year ending March 31, 1983. That decline represents a drop in sales in the metropolitan Chicago area of over 21% in two years (R. 59, p. 39, ¶78; R. 64, pp. 1, 2, ¶3, Exhibit "A," p. 28).

During the same time period, Romano's sales of Renfield products decreased from 242,185 cases to 203,648 cases, a drop of nearly 16% (R. 59, pp. 39-40, ¶82; R. 64), and Continental's sales of all Renfield's products decreased over 22% (from 168,410 cases to 130,841 cases). (R. 59, p. 40, ¶¶82, 83; R. 64). The total decrease in Romano's and Continental's sales of Renfield's products in the two years immediately subsequent to Valley's termination was 76,106 cases (R. 59, p. 40, ¶84; R. 64).

Although Renfield's sales in the greater Chicago metropolitan area decreased by more than 21% in the two years

subsequent to Valley's termination as a Renfield distributor, the nationwide sales of distilled spirits from 1981 to 1982 decreased by less than 5% and, during the first six months of 1983, the sales of distilled spirits nationwide were higher than for the first six months of 1982. (R. 75, p. 22, Exhibit "B").

6. Renfield's Market Power In A Relevant Market

The court of appeals' 1982 preliminary injunction opinion defined "market power" to be the "power to raise prices significantly above the competitive level without losing all of one's business." *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 678 F.2d 742, 745 (7th Cir. 1982). Upon remand of the case to the district court, Valley initiated discovery aimed at determining that Renfield possessed "market power."

Renfield's Chicago sales manager testified that Renfield sold no product in DuPage, McHenry or Cook counties for which a significant increase in Renfield's prices would eliminate sales of the product. (R. 59, pp. 42-44, ¶92). He testified that there was no "particular price level" at which Gordon's Gin or Gordon's Vodka had to be sold at retail in order to be "sellable" to the retail public and that, if the price of Gordon's Vodka, and all other Renfield products, were increased a dollar per bottle, Renfield would still sell the product. (*Id.*). In fact, with respect to Gordon's Vodka, the executive testified that Gordon's Vodka "didn't sell on price alone. It sold on advertising and merits of the product." (R. 59, p. 43, ¶92). The National Sales Manager also testified that a substantial price increase in Renfield's products would not eliminate all of Renfield's sales of that product (R. 59, p. 44, ¶93; R. 89, pp. 105-08).

Renfield's Chicago Metro Manager/Northern Illinois State Manager testified that Renfield was one of the six

largest national distributors in the Chicago area (R. 59, p. 45, ¶94; R. 49, p. 81). At the time of Valley's termination as a Renfield distributor, Gordon's Vodka was the best-selling brand of distilled spirits in DuPage and McHenry counties (R. 20, p. 96).

With respect to the national market, Valley offered evidence establishing Renfield as the nation's ninth largest seller of distilled spirits as of 1980 and the sixth largest seller of wines (R. 59, p. 45, ¶96; R. 59, Exhibit "A," p. 1), and two Renfield products (Gordon's Gin and Gordon's Vodka) are among the nation's top twenty brands (R. 59, p. 45, ¶97; R. 59, Exhibit "B"). With respect to the product market, *Impact Magazine* identified the market for distilled spirits and wines as a discrete product market, and there was testimony from a Renfield sales executive that there was no substitutability between distilled spirits and wine, on the one hand, and other products. (R. 59, pp. 45-46, ¶99; R. 49, pp. 93-94). With respect to the geographic market, Renfield's local and national sales managers acknowledged that each county affected could be viewed as a separate market (R. 59, pp. 46-50, ¶¶100-05).

7. Expert Testimony

Subsequent to filing its motion for summary judgment in this cause, Renfield retained an expert economist and submitted that expert's affidavit, in which the expert concluded: That the market for wines and distilled spirits in DuPage, McHenry and Cook counties was too narrow to be economically meaningful; that Renfield did not have significant market power in any economically meaningful market; that as a result of the lack of Renfield's market power, its termination of Valley could not harm competition; and that, even if Renfield did possess market power, its actions were not the sort that would reduce output

and thereby harm competition. (R. 71, Exhibit "A," pp. 3 and 4, ¶7).

The conclusions asserted by Renfield's expert in his affidavit were undermined by his deposition testimony. For example, although he attempted in his affidavit to explain how a hypothetical free rider problem could be overcome by an importer's decision to reduce the number of its distributors, Renfield's expert acknowledged, at his deposition, that (1) he had no knowledge at all whether Valley was a free rider and (2) he did not know what pre-sales services Renfield desired its distributors to perform in the Chicago metropolitan area (R. 75, pp. 4-5; R. 90, p. 25). Further, although he concluded that the test of whether a distribution change is anticompetitive is whether sales have decreased, the expert admitted at his deposition that he was not aware of the fact that, during the two years following Valley's termination, Renfield's total sales in the Chicago area actually had decreased 21%. (R. 75, pp. 5 and 6). Renfield's expert also acknowledged that if a distiller decided to terminate its lowest-priced distributor when that distributor was not a free rider and, in fact, provided as many, if not more, pre-sale services to retailers, and if the distiller subsequently refused to reinstate that distributor despite a 21% drop in sales in a two year period, one could conclude that the decision to terminate and the decision not to reinstate the distributor did not arise from the exercise of independent business judgment. (R. 75, p. 22; R. 90, pp. 154-59).

Valley also retained an expert economist. Valley submitted its expert's affidavit (R. 75, Exhibit "A"), which refuted the conclusions asserted by Renfield's expert and, among other things, established Renfield's market power (R. 75, Ex. "A," pp. 7-11, ¶¶20-30). Renfield never sought to depose Valley's expert or otherwise attempt to rebut his expert opinions.

REASONS FOR GRANTING THE WRIT

Introduction

In the past three years, this Court has issued a number of opinions identifying an antitrust plaintiff's burden of proof when establishing a conspiracy to fix prices, an antitrust plaintiff's need to establish a defendant's market power when the proof establishes an adverse impact upon competition as a result of that defendant's conduct and the appropriate use of summary judgment procedures to resolve cases short of trial. In this case, the Seventh Circuit's opinion represents a substantial departure from this Court's precedent, and, as a result, petitioner has been denied its right to a jury trial, despite the identification of factual disputes as to material issues, as evidenced most tellingly by the diametrically opposed opinions of fact offered by the parties' expert witnesses.

More fundamentally, the Seventh Circuit's decision in this case—totally apart from its misapplication of summary judgment practice and this Court's precedent in the context of the antitrust laws—represents the latest decision in a growing trend by the Seventh Circuit to develop its own body of antitrust laws separate from the interpretation of those laws provided by this Court. The Seventh Circuit has become notorious for its disinclination to enforce the antitrust laws, and this Court, in the exercise of its supervisory powers, should review this case in order to examine the Seventh Circuit's interpretation of the antitrust laws in the context of the precedent established by the decisions of this Court.

When a court requires fifteen pages of the Federal Reporter to address and resolve the contested factual issues identified in a party's opposition to a motion for summary

judgment and concludes that summary judgment is appropriate because one party's subjective statements of intentions are, in the opinion of the court, "plausible," it becomes necessary for this Court to accept the case on review and to define the appropriate limits of summary judgment practice, particularly in complex cases. Acceptance of the Seventh Circuit's abuse of summary judgment practice will serve only to encourage the use of summary judgment as a substitute for a jury trial and will transform summary judgment practice into "full blown paper trial[s] on the merits," as Justice Brennan warned in his dissent to this Court's opinion in *Anderson v. Liberty Lobby, Inc.*, ___ U.S. ___, 106 S.Ct. 2505, 2519 (1986) (Brennan, J., dissenting).

Similarly, when an antitrust plaintiff, in response to a motion for summary judgment, introduces evidence which, if accepted, establishes that (1) the plaintiff had been the lowest-priced distributor of the defendant's product in a geographic area, (2) the plaintiff's competitors had complained to the defendant about the plaintiff's pricing practices, (3) plaintiff's termination as a distributor followed a series of meetings between the defendant and plaintiff's competitors in which a variety of trade-offs were made with respect to the distribution rights of plaintiff's competitors, (4) defendant, despite having the opportunity, never identified any legitimate business interests it sought to advance by plaintiff's termination as a distributor, (5) the man who decided to terminate the plaintiff admitted at his deposition that the termination was motivated at least in part by a concern for an "unhealthy situation" in which distributors were "undercutting each other in prices," and (6) the stated reasons for the defendant's decision were rebutted by other facts in the record, summary judgment on the question of a conspiracy to fix prices is inappropriate. The Seventh Circuit, however, not only

found that summary judgment was appropriate, but it also imposed upon antitrust plaintiffs the additional burden of disproving, at summary judgment, the possibility that the defendant's decision resulted from an error in business judgment, thus severely undermining this Court's holding in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984).

Finally, when the plaintiff in a Petition for Rehearing identifies a decision of this Court in direct conflict with the Seventh Circuit's decision and the Seventh Circuit's denial of the Petition for Rehearing not only provides no reasons for the denial but also omits reference to this Court's decision, review by this Court is warranted. At a minimum, the Seventh Circuit should be directed to re-evaluate this case in light of this Court's holding in *Federal Trade Commission v. Indiana Federation of Dentists*, ____ U.S. ____, 106 S.Ct. 2009 (1986).

I.

THIS COURT SHOULD EXERCISE ITS SUPERVISORY POWERS TO REVIEW THE DECISION BELOW

As set forth more fully below, the Seventh Circuit's opinion represents a departure from accepted summary judgment practice (and, indeed, an indifference to this Court's cautionary statements in *Anderson v. Liberty Lobby, Inc.*, ____ U.S. ____, 106 S.Ct. 2505 (1986)), an effective elimination of the *Monsanto* conspiracy burden of proof and a refusal to apply *Indiana Dentists*. Those errors alone justify granting this Petition.

The reasons for granting this Petition become even greater when one considers that this is a case brought pursuant to the antitrust laws and that the court rendering the decision below is the Seventh Circuit. This case does not represent an isolated instance in which the Seventh Cir-

cuit has erred in its application of the antitrust laws. Rather, the Seventh Circuit has gained notoriety for its refusal to adhere to settled principles of antitrust laws, and this Court, in the exercise of its powers of supervision, should grant this Petition and scrutinize the Seventh Circuit's decision.

It is necessary for this Court to reverse this case not only to correct the errors committed by the lower court but to deliver a clear, unmistakable message to the inferior courts of this country that this Court's holdings control and are binding and that the inferior courts are not permitted to pick and choose among this Court's holdings to develop their own, separate bodies of federal law. Stated simply, the Seventh Circuit is out of step with this Court and with the other circuits adhering to this Court's decisions, and this Court should bring the Seventh Circuit back into step before other circuits seek to develop their own bodies of law with regard to other questions of federal law, such as the securities laws, the Racketeer Influenced and Corrupt Organization Act, employment discrimination, civil rights and the fundamental rights guaranteed by our Constitution.

In the Winter, 1987 issue of *Antitrust*, published by the American Bar Association, the Seventh Circuit's treatment of the antitrust laws was reviewed:

> In reviewing the Seventh Circuit's decisions over the past four years, the result is indisputable: If you are the plaintiff you generally lose; if you are the defendant you generally win. Whatever may be one's personal opinions with respect to recent decisions, this trend must be understood. It also must be understood that the exceptions to the trend, the occasional cases where plaintiffs have prevailed, have usually occurred in spite of vigorous and searching appellate review. To even undertake a case in the Seventh Circuit therefore, plaintiff's counsel must be prepared

> to develop meticulously every element of the claim—from interstate commerce, to antitrust injury, to substantive violation, to damages. Moreover, if the plaintiff prevails at the district court level, scrupulous attention must be paid to the record on appeal, since it is not unlikely that the case will receive de novo appellate review under the lens of a Chicago School microscope.

Freed, "Antitrust In The Seventh Circuit From The Plaintiff's Perspective," *Antitrust*, Winter, 1987, p. 28. When an inferior court becomes notorious for its refusal to accept antitrust violations, this Court's review is warranted.

II.

THE SEVENTH CIRCUIT MISAPPLIED SUMMARY JUDGMENT PRACTICE

This Court has recently decided a number of cases concerning the appropriate uses of summary judgment. This Court's recent decisions uphold the longstanding limitations upon the courts' ability to weigh competing evidence and make credibility determinations when faced with motions for summary judgment.

Last year, in *Anderson v. Liberty Lobby, Inc.*, ____ U.S. ____, 106 S.Ct. 2505 (1986), this Court reinforced its prior holdings that "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." 106 S.Ct. at 2511. This Court further cautioned against the abuse of summary judgment:

> Our holding that the clear-and-convincing standard of proof should be taken into account in ruling on summary judgment motions does not denigrate the role of the jury. It by no means authorizes trial on

> affidavits. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. [Citation omitted]. Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial.

Id. at 2513-14. This Court's opinion in *Anderson* drew the dissent of three members of this Court. In his dissent, Justice Brennan expressed fears that this Court's opinion would "transform what is meant to provide an expedited 'summary' procedure to a full blown paper trial on the merits," *Id.* at 2519 (Brennan, J., dissenting) and warned that "if the judge on motion for summary judgment really is to weigh the evidence, then in my view grave concerns are raised concerning the constitutional right of civil litigants to a jury trial." *Id.* at 2520 (Brennan, J., dissenting).

In this case, this Court's limitations upon the use of summary judgment have been ignored, and Mr. Justice Brennan's fears have been realized: The district court and the Seventh Circuit conducted full blown paper trials on the merits of petitioner's case, and petitioner, as a result, was denied its Seventh Amendment right to a jury trial. Petitioner directed the trial court to the testimony of six of respondent's employees, respondent's sales records, trade documents, the deposition transcript of respondent's expert, and the affidavit of petitioner's own expert, which affidavit addressed and controverted each of the expert opinions advanced by respondent's expert. If that evidence

had been accepted and believed (as this Court required in *Anderson*), one would have concluded that respondent possessed market power in a relevant market, that respondent's restraint of trade in that market impaired competition unreasonably, and that respondent's termination of its best and lowest-priced distributor resulted from a conspiracy to fix prices and not from respondent's exercise of independent business judgment.

The courts below, however, rejected petitioner's evidence and looked, instead, to the respondent's evidence. The courts found that respondent's explanation for its decision to terminate petitioner was "plausible" and, despite petitioner's expert's opinion, that respondent lacked market power. Furthermore, in doing so, the courts ignored the evidence offered by petitioner which directly rebutted respondent's explanation for its decision to terminate petitioner, evidence which would have been introduced in petitioner's rebuttal case had petitioner been given an opportunity to bring its claims to trial.[1]

[1] Petitioner established the absence of a factual basis for the generalized statements offered by Renfield's National Sales Manager for Renfield's decision to terminate Valley. Among other things, despite the claim that the decision to terminate was based upon considerations of relative manpower, Renfield was not aware of the relative manpower of Valley and its competitors in the relevant counties. Further, in its answers to interrogatories, Renfield never advanced a reason for Valley's termination that was consistent with the National Sales Manager's testimony, and Renfield's Chicago Sales Manager, who discussed Valley's termination with the National Sales Manager, was never advised of any of the reasons for Valley's termination advanced by the National Sales Manager in his deposition. (R. 59, p. 20.) Finally, the National Sales Manager's suggestion that the decision to terminate Valley was based upon consideration of the relative portfolios of the other alcoholic beverages distributed by Valley, Continental and Romano was rebutted by evidence that all three companies distributed alcoholic beverages which competed with Renfield's brands and that both Valley and Continental, for example, distributed Smirnoff Vodka, the primary competitor of Renfield's Gordon's Vodka.

It is apparent that the courts below misconstrued *Anderson* and that Mr. Justice Brennan's concerns that *Anderson* would be misapplied have come to fruition. Review of this case by this Court is required to clarify *Anderson* and to define the appropriate limits of summary judgment practice.

III.

THE SEVENTH CIRCUIT HAS UNDERMINED THIS COURT'S STANDARD FOR PROVING THE EXISTENCE OF AN ANTITRUST CONSPIRACY

In *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), this Court identified the plaintiff's burden in establishing an antitrust conspiracy to fix prices:

> Thus, something more than evidence of complaints is needed. There must be evidence that tends to exclude the possibility that the manufacturer and non-terminated distributors were acting independently. As Judge Aldisert has written, the antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others "had a conscious commitment to a common scheme designed to achieve an unlawful objective."

465 U.S. at 764. In this case, petitioner met that burden.

First, petitioner established that it was the lowest-priced distributor and that respondent's other distributors complained to respondent about petitioner's pricing practices. Second, petitioner offered evidence—principally derived from the concessions of respondent's executives—that there were no aspects of non-price competition in which petitioner was inferior to respondent's other distributors or that respondent sought to enhance as a result of petitioner's termination as a distributor. Third, petitioner asked respondent to provide an identification of respondent's business objectives that it hoped to advance through

petitioner's termination as a distributor, but respondent failed to do so. Finally, petitioner offered evidence which established that respondent's termination of the petitioner did not result from an erroneous exercise of business judgment, as evidenced both by respondent's sales executive's acknowledgment in open court subsequent to the initiation of the litigation that petitioner was respondent's best distributor and by respondent's refusal, despite a 21% decline in sales in the two years immediately following petitioner's termination, to reconsider its termination of petitioner or to correct its course of action.

The Seventh Circuit, however, weighed and rejected petitioner's proof. Despite the evidence offered by petitioner to rebut respondent's national sales manager's self-serving explanation of the factors which led to respondent's decision to terminate the petitioner (see footnote 1, *supra*), the court held that petitioner had established, at most, that respondent had made a bad business decision.

The Seventh Circuit's analysis is flawed in two respects, both of which compel this Court's review. First, the Seventh Circuit ignored petitioner's proof directly rebutting respondent's explanation, and in any event, respondent itself never even asserted erroneous business judgment as a defense or conceded its business error at any point in the case. The Seventh Circuit simply hypothesized an excuse for respondent's conduct which not only does not manifest itself in the record but was also never even claimed by the respondent.

Second and more fundamentally, the Seventh Circuit's analysis undermines this Court's holding in *Monsanto*. By requiring an antitrust plaintiff to prove at the summary judgment stage that the defendant's termination of the plaintiff as a distributor did not result from an erroneous business judgment is to effectively eliminate the antitrust

laws as a remedy for terminated distributors. The court's opinion places an insurmountable burden upon the antitrust plaintiff.

Basic to any analysis of an antitrust defendant's conduct, particularly in the context of the defendant's motive, is the assumption that businessmen act rationally and are motivated by a desire to maximize profits. In *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corporation*, 475 U.S. 574, 106 S.Ct. 1348 (1986), this Court explicitly acknowledged that assumption: "To the contrary, as presumably rational businesses, petitioners had every incentive *not* to engage in the conduct with which they are charged, for its likely effect would be to generate losses for petitioners with no corresponding gains." 106 S.Ct. at 1360-61 (emphasis in original). In other contexts, this Court has permitted parties to rely upon the assumption of businesses' rationality, and it has announced rules of law based upon that assumption which do not require proof of a business's rational conduct. In *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978), for example, this Court held in the context of discriminatory hiring practices that a prima facie case of employment discrimination under the factors identified in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), raises an inference of discrimination

> largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with *some* reason, based his decision on an impermissible consideration such as race.

438 U.S. at 577 (emphasis in original).

Even if one were to assume that antitrust defendants could assert mistaken business judgment as a defense, it is particularly inappropriate at the summary judgment stage to impose upon the plaintiff the burden of disproving mistake as part of its prima facie case. In this case, the mistake in judgment was never asserted as an affirmative defense or contended by respondent Renfield in any pleading filed in the court. Further, the question of mistake is a question particularly within the province of the finder of fact, as evidenced by this case.

Here, Renfield's national sales manager offered an explanation of the criteria upon which he determined to terminate petitioner Valley. Valley, in response, identified the factual inaccuracies contained in Renfield's executive's statement of reasons for termination. Those factual inaccuracies created a factual issue concerning the stated bases for Renfield's decision.

At that point, it is incumbent upon the trier of fact to determine whether Renfield's executive was intentionally mischaracterizing the reasons for Valley's termination or whether, as the Seventh Circuit hypothesized, Renfield's decision resulted from a misapprehension of facts and of the conditions of the Chicago metropolitan market. Requiring the antitrust plaintiff to offer affirmative evidence of a conscious decision to deceive rather than a misperception of the market essentially requires that plaintiff to introduce direct evidence of a conspiracy, thus resulting in the elimination of this Court's *Monsanto* rule.

Valley believes that this Court should hold that the antitrust plaintiff need not prove the absence of mistake at all, since the presumed rationality of businesses underlies the courts' economic analysis of the antitrust laws. In the alternative, if a defendant is permitted to claim an error in judgment as a defense to the antitrust laws, this Court should require that defense to be asserted af-

firmatively, and the burden should be placed upon the defendant to establish the error, with an opportunity for the plaintiff similar to that provided in discrimination cases to establish that the claimed error in judgment is pretextual. In any event, this Court should review this case and establish that, at summary judgment and in particular in the absence of an affirmative defense of erroneous business judgment, the antitrust plaintiff satisfies its burden of production when it introduces evidence establishing the absence of any legitimate independent business reason for the defendant's termination of its lowest-priced distributor after receiving complaints from that distributor's competitors.

IV.

THE SEVENTH CIRCUIT ERRONEOUSLY REQUIRED PROOF OF RESPONDENT'S MARKET POWER

Totally apart from its rejection of petitioner's economist's expert opinion that, as a matter of economics, respondent possessed market power, the Seventh Circuit's holding that petitioner failed to raise a triable issue of fact concerning respondent's market power was erroneous given this Court's opinion in *Federal Trade Commission v. Indiana Federation of Dentists,* ____ U.S. ____, 106 S.Ct. 2009 (1986), a case in which this Court reversed the Seventh Circuit. In *Indiana Dentists,* this Court held as follows:

> Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, "proof of actual detrimental effects, such as a reduction of output" can obviate the need for an inquiry into market power, which is but a "surrogate for detrimental effects." 7 P. Areeda, Antitrust Law ¶ 1511, p. 429 (1986). In this case, we conclude that the finding of actual, sustained adverse

> effects on competition in those areas where IFD dentists predominated, viewed in light of the reality that markets for dental services tend to be relatively localized, is legally sufficient to support a finding that the challenged restraint was unreasonable even in the absence of elaborate market analysis.

106 S.Ct. at 2019 (footnote omitted). In this case, Valley offered evidence of a detrimental effect on competition, as Renfield's sales in the market decreased by 21% in two years, in sharp contrast to both the sales history of alcoholic beverages generally and Renfield's nationwide sales during the same period.

Having established the detrimental impact of Renfield's restraint of trade, Valley was not required to offer proof of market power.[2] Pursuant to the rules of the Seventh Circuit, Valley directed that court to this Court's opinion in *Indiana Dentists* immediately prior to the rendering of the court's decision. Recognizing that its citation of *Indiana Dentists* had been made too close to the date of issuance of the court's opinion to have provided the court with an opportunity to review the case, Valley again directed the court to *Indiana Dentists* in the course of its Petition for Rehearing. In rejecting the Petition, the Seventh Circuit did not identify the reasons for its deci-

[2] Valley, in fact, did offer proof of Renfield's market power, derived in part from Renfield's key sales executives' acknowledgments at their depositions that Renfield's products did not sell on price alone and that Renfield possessed the ability to raise prices on its products without losing all of its sales. Further, Valley introduced evidence of Renfield's size relative to other national importers of alcoholic beverages, and there was evidence in the record that one of Renfield's products (Gordon's Vodka) was the single most popular distilled spirit in DuPage and McHenry Counties, Illinois. Finally, Valley's expert economist concluded that the evidence in the record was inconsistent with the absence of market power.

sion and, most importantly, did not even address *Indiana Dentists*.

This Court, at a minimum, should remand the case to the Seventh Circuit with instructions to reconsider its decision in light of *Indiana Dentists* and to address the impact of *Indiana Dentists* upon Valley's proof. The facts of this case satisfy the requirements of *Indiana Dentists*, and summary judgment was inappropriate.

CONCLUSION

Petitioner Valley Liquors, Inc. respectfully submits that this Court should grant this Petition, direct a Writ of Certiorari to the Seventh Circuit Court of Appeals in this case, reverse the Seventh Circuit's decision and remand this cause for trial.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 86-1040

VALLEY LIQUORS, INC.,
an Illinois Corporation,

Plaintiff-Appellant,

v.

RENFIELD IMPORTERS, LTD.,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 81 C 6285—**John F. Grady**, *Judge.*

ARGUED SEPTEMBER 18, 1986—DECIDED JUNE 3, 1987

Before WOOD, JR., COFFEY, and RIPPLE, *Circuit Judges.*

WOOD, JR., *Circuit Judge.* Valley Liquors, Inc. ("Valley"), an Illinois corporation, appeals from a district court order granting summary judgment in favor of defendant Renfield Importers, Ltd. ("Renfield"). Specifically, Valley contends that the district court erred in granting summary judgment for Renfield on Valley's claims that Renfield and others had conspired to fix prices in violation of the Sherman Antitrust Act, 15 U.S.C. § 1 (1982) (Count I), that Renfield's decision to terminate Valley in three counties unreasonably restrained trade, also in violation of 15 U.S.C. § 1 (Count II), and that Renfield breached

its distributorship agreement with Valley (Count III). We affirm the district court's judgment as to all three counts.

I. FACTUAL BACKGROUND

Valley Liquors, Inc. is a wholesale distributor of alcoholic beverages. Renfield Importers, Ltd. is an importer and national distributor of various brands of distilled spirits and wines, including Gordon's Vodka, Gordon's Gin, and Giacobazzi wine. Before November 1, 1981, Valley had been one of Renfield's distributors for over twenty-six years, having a territory throughout Illinois. The majority of Valley's sales for Renfield took place in the northern Illinois counties of McHenry and DuPage, and portions of Cook County. Other Renfield distributors in those counties, and thus Valley's competitors, were Romano Brothers Beverage Company ("Romano") and Continental Distributing Company, Inc. ("Continental").

In July 1981, Renfield met separately with Valley, Romano, and Continental, and suggested that it was contemplating a realignment of its entire Illinois distributorship network. In October 1981, Renfield informed its distributors of its changes. Renfield told Romano that it would gain the right to sell Gordon's Vodka and Henkell Sparkling Wines and would become the exclusive distributor of Renfield's Sonoma Wines, but that it would lose its exclusive distributorship of Giacobazzi wines. Renfield told Continental it would no longer have the right to serve as exclusive distributor of Gordon's Vodka in Cook County and would not distribute Renfield's Piper Heidseick Champagne, Henkell Sparkling Wines and Sonoma Wines. Both Romano and Continental were initially angry and upset over the changes in their rights, but after meetings with Renfield decided to accept the realignment. Renfield then advised Valley on October 22 that it would be eliminating Valley effective November 1, 1981, as Renfield distributor in DuPage, McHenry, and Cook counties. Valley would, however, retain the exclusive right to distribute Renfield's products in the counties of Will, Winnebago, Carroll, Boone, Bureau, and Whiteside; and would have the dual right to

distribute Renfield's products in DeKalb, Kane, and Kendall counties.

Valley brought suit against Renfield on November 10, 1981, alleging that Renfield had breached its contract with Valley by terminating Valley in bad faith and had violated the Sherman Act, 15 U.S.C. § 1 (1982), in two respects—by conspiring with others to fix prices and by unreasonably restraining trade in terminating Valley as distributor in three Illinois counties. Valley also filed a contemporaneous motion for a temporary restraining order and preliminary injunction. After conducting a hearing, the district court on November 17, 1981, denied Valley's motion for preliminary injunction. Valley appealed, and this court affirmed.[1] *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 678 F.2d 742 (7th Cir. 1982) (*Valley I*).

Renfield subsequently filed a motion for summary judgment. The parties proceeded with discovery. Valley filed an amended complaint, and Renfield filed a motion to dismiss Count III of that complaint, a breach of contract claim. The parties continued discovery and filed various materials regarding Renfield's motion for summary judgment.

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[1] In rejecting Valley's claim that Renfield and Valley's competitors had conspired to terminate Valley and thereby increase wholesale prices of Renfield products, we held that the circumstantial evidence in the limited preliminary injunction record was "too tenuous to require the trier of fact to draw the inference [of a conspiracy] that Valley asked him to draw" and that "plaintiff did not prove an improper motive by its supplier." *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 678 F.2d 742, 744 (7th Cir. 1982). We also rejected Valley's contention that Renfield's termination of Valley was an unreasonable restraint of trade. We noted that Valley had not sought to prove Renfield's market power, which we held is a preliminary and necessary step in establishing illegality under the balancing test set forth in *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 57 n.27 (1977). 678 F.2d at 745.

On December 31, 1985, the district court granted Renfield's motion for summary judgment on all three counts of Valley's amended complaint.[2] Valley appeals.

II. ANALYSIS

Valley challenges the district court's grant of summary judgment on each of the three counts of its amended complaint. Our framework for analyzing Valley's contentions regarding the grant of summary judgment is as follows. After Renfield moved for summary judgment, Valley had the responsibility of going beyond the pleadings and setting forth "specific facts showing that there [was] a genuine issue for trial." Fed. R. Civ. P. 56(e); *see Celotex Corp. v. Catrett*, 106 S. Ct. 2548, 2553 (1986). A grant of summary judgment was then proper if "there [was] no genuine issue as to any material fact and if [Renfield was] entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). We must decide whether the district judge correctly determined that there were no "*genuine* factual issues that properly [could] be resolved only by a finder of fact because they [could] reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby*, 106 S. Ct. 2505, 2511 (1986) (emphasis added).

A genuine issue for trial only exists when there is sufficient evidence favoring the nonmovant for a jury to return a verdict for that party. *Id.* As the Supreme Court has stated, "[i]f the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* (citations omitted). We must not weigh the evidence.[3]

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[2] The district court properly treated the motion to dismiss Count III as a motion for summary judgment on that count pursuant to Fed. R. Civ. P. 12(b).

[3] Valley asserts that the district court acted improperly in weighing the evidence. Valley does not, however, provide any examples. We find that the district court properly considered Valley's evidence, took inferences in Valley's favor, and decided that the evidence was not adequate to persuade a reasonable jury that Renfield conspired to modify Valley's distribution rights.

See Staren v. American National Bank & Trust Co., 529 F.2d 1257, 1261 (7th Cir. 1976). Instead, we must see if the nonmovant's evidence is sufficient. In determining whether evidence is sufficient, we must of necessity consider the substantive evidentiary standard of proof, for example, preponderance of the evidence, that would apply at a trial on the merits. *Anderson*, 106 S. Ct. at 2512. In addition, we draw all inferences in favor of the nonmovant. *Bartman v. Allis-Chalmers Corp.*, 799 F.2d 311, 312 (7th Cir. 1986); *Rodeo v. Gillman*, 787 F.2d 1175, 1177 (7th Cir. 1986). Such inferences, however, must be "justifiable." *Anderson*, at 2513; *see Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970); *Bartman*, 799 F.2d at 312-13; *Matthews v. Allis-Chalmers*, 769 F.2d 1215, 1218 (7th Cir. 1985).

Thus we will find that the district court properly granted summary judgment for Renfield on each of the three counts of Valley's amended complaint if we determine that there was no genuine issue of material fact for trial, which turns on our decision that there was insufficient evidence, taking into account the evidentiary standard of proof and drawing all reasonable inferences in Valley's favor, to allow a rational jury to decide for Valley.[4]

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[4] Valley argues that the above standards for summary judgment should be considered in light of a general reluctance to grant summary judgment in complex antitrust litigation. Valley cites *Poller v. Columbia Broadcasting System*, 368 U.S. 464 (1962) and that Court's statement that "summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot."

Recently, however, courts have not displayed such hesitation to grant summary judgment in antitrust cases. In *Matsushita Electric Industry Co. v. Zenith Radio Corp.*, 106 S. Ct. 1348 (1986), a recent antitrust case involving section 1, the Supreme Court did not cite *Poller* and was not reluctant to affirm a grant of summary judgment. Indeed, the Court appeared to encourage the use of summary judgment where appropriate in *Matsushita* and two other cases handed down the same term, *see Anderson v. Liberty*

(Footnote continued on following page)

A. *Count I—Conspiracy*

Valley argues that the district court improperly granted summary judgment on Valley's claim that Renfield conspired with Romano and Continental to fix prices, conduct that is illegal *per se* under the Sherman Antitrust Act, 15 U.S.C. § 1 (1982).[5]

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[4] *continued*

Lobby, Inc., 106 S. Ct. 2505 (1986); *Celotex Corp. v. Catrett*, 106 S. Ct. 2548 (1986). Furthermore, in another decision handed down during the 1985 term, the Supreme Court rejected a reading of *Poller* that would mean that a party could defeat a "properly supported" summary judgment motion "without offering any concrete evidence from which a reasonable juror could return a verdict in his favor and by merely asserting that the jury might, and legally could, disbelieve" the defendant's denial of a claim. *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2514 (1986). This court has stated in *Lupia v. Stella D'Oro Biscuit Co.*, 586 F.2d 1163 (7th Cir. 1978), *cert. denied*, 440 U.S. 982 (1979), that summary judgment should be a favored practice in antitrust cases.

> The very nature of antitrust litigation would encourage summary disposition of such cases when permissible. Not only do antitrust trials often encompass a great deal of expensive and time consuming discovery and trial work, but also . . . the statutory private antitrust remedy of treble damages affords a special temptation for the institution of vexatious litigation . . . . The ultimate determination, after trial, that an antitrust claim is unfounded, may come too late to guard against the evils that occur along the way.

Id. at 1167. *See Terry's Floor Fashions, Inc. v. Burlington Industries, Inc.*, 763 F.2d 604, 610 (4th Cir. 1985) ("Summary judgment clearly remains, however, an appropriate procedure in antitrust litigation. Rule 56 should not be 'read out of antitrust cases.'" (quoting *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 289 (1968)).

[5] Valley asserts that Renfield engaged in a *horizontal* conspiracy. Alleged price fixing between a manufacturer and distributors, however, is more properly termed a "vertical" conspiracy. *See Burlington Coat Factory Warehouse Corp. v. Esprit De Corp.*, 769 F.2d 919, 923 (2d Cir. 1985); *Red Diamond Supply, Inc. v. Liquid Carbonic Corp.*, 637 F.2d 1001, 1007 (5th Cir. 1981), *cert. denied*, 454 U.S. 827 (1981). A horizontal conspiracy occurs when the

(Footnote continued on following page)

Although our summary judgment analysis employs the above legal framework, when analyzing a section 1 conspiracy claim, we apply the standard established in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), and reaffirmed in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 106 S. Ct. 1348, 1356 (1986). The inferences drawn from underlying facts must be viewed in the light most favorable to the nonmovant, but "antitrust law limits the range of permissible inferences from ambiguous evidence in a [section] 1 case." *Id.* at 1357. The *Matsushita* court reaffirmed its holding in *Monsanto* that "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Id.*; *see id.* at 1362 n.21. "[A] plaintiff seeking damages for a violation of [section] 1 must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." *Id.* at 1357 (quoting *Monsanto*, 465 U.S. at 764). In other words, to successfully contest a motion for summary judgment, the plaintiff "must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action." *Id.* This is the standard Judge Posner appears to have articulated in *Valley I*, 678 F.2d at 744, when he stated, "[i]t is therefore not enough to show that Continental and Romano, acting separately . . . wanted to get rid of a competitor; there must also be evidence that in terminating Valley Renfield was acceding to their desire rather than acting to promote an independent conception of its self-interest."

Valley fails on this essential point because it has not provided evidence tending to exclude the possibility that

[5] *continued*

source of a conspiracy is a combination of distributors. *H & B Equipment Co. v. International Harvester Co.*, 577 F.2d 239, 245 (5th Cir. 1978). The actual label placed on the conspiracy is a "pedantic distinction," *see Valley I*, 678 F.2d at 744, as the *Monsanto* standard applies regardless of which label is attached. *Burlington Coat Factory*, 769 F.2d at 923.

Renfield acted independently, or that would show that the inference of conspiracy to fix prices is reasonable in light of the competing inference of independent action. Valley has not proffered any direct evidence that would show that the separate meetings between Renfield and Romano and Continental were conspiratorial, or that would suggest that these meetings were anything other than unilateral notifications of Renfield's realignment plans. Neither is there any evidence that Continental and Romano, or Renfield, for that matter, communicated with each other at those meetings regarding Valley. Thus Valley urges us to find that the circumstantial evidence surrounding the events leading to the changes in its distribution rights leads to an inference of conspiracy.

Valley argues that price complaints and circumstances regarding Renfield's separate meetings with Continental and Romano preceding the realignment lead to an inference that Renfield conspired with Valley's competitors, Romano and Continental, to terminate Valley. Renfield's realignment occurred against a backdrop of price competition between Valley and Romano and Continental, Valley typically undercutting Romano and Continental by five percent. Valley alleges that Romano and Continental had previously complained to Renfield that because of Valley's pricing policies, they were forced to lower their prices to retailers and thus could not make money distributing Renfield products. Valley has not shown, however, that the complaints were directed specifically at Valley. Renfield representatives, on whom Valley relies for evidence of price complaints, testified that all three distributors, including Valley, complained about the prices of every other distributor. As the *Monsanto* Court noted, such complaints " 'are natural.' " *Monsanto*, 465 U.S. at 763 (quoting Monsanto's brief).

Valley recognizes, in any event, that the *Monsanto* Court specifically stated that price complaints alone followed by a termination are not enough to support an inference of conspiracy. *Id.* at 764. Valley apparently attempts to argue that the price complaints in addition to the evidence

of separate meetings between Renfield and its distributors lead to an inference of conspiracy. Renfield conducted independent and separate meetings with Romano and Continental in October to inform them of the realignment. Both Romano and Continental were angry about the changes brought by the realignment. Continental's president, Cooper, immediately broke off his meeting with a Renfield representative when he learned that he would no longer be distributing various wines and that he would no longer be an exclusive distributor of Gordon's Vodka in Cook County. Renfield postponed the meeting it had scheduled with Valley to advise Valley of the changes. At that time Cooper had no knowledge of how Renfield's realignment would affect Valley. Cooper then met with Renfield's president in New York, and immediately upon his return to Illinois, accepted the Renfield distributorship changes. After Cooper's acceptance of the plan, Renfield informed Valley of the plan, ten days before it was going to implement the changes and thus terminate Valley's distributorship rights in three counties. Valley argues that the combination of Continental's and Romano's dissatisfaction with Valley's pricing policies and Cooper's acceptance of the realignment upon his return from New York leads to an inference that Cooper, as president of Continental, accepted the changes in his distributorship rights as a quid pro quo for Renfield's termination of Valley.

We cannot agree that the above circumstances support an inference of conspiracy. Cooper's delay in accepting the plan is just as consistent with, and perhaps more consistent with a general unhappiness with the severe cutbacks in his rights than it is with an inference that he was dealing or conspiring with Renfield to terminate Valley. As we stated in *Valley I*, 678 F.2d at 743, the hypothesis that Continental and Romano demanded and received Valley's termination as a quid pro quo for the changes in their rights is "too speculative to compel a trier of fact to infer conspiracy."

Were we to determine that the evidence supported an inference of conspiracy, however, we would find that such

an inference would not be reasonable in light of the competing inferences of Renfield's independent action. The evidence regarding the separate meetings between Renfield and Continental and Romano is ambiguous at best and does not help to exclude the possibility that Renfield acted independently. Renfield had informed the three distributors the previous July that it was contemplating a realignment. Continental's president Cooper at that time told Renfield that he would be "very unhappy" if Continental lost the right to remain as Renfield's exclusive distributor of Gordon's Vodka in Cook County. Renfield made severe changes in the rights of all three distributors, and all three were unhappy. Both Romano and Continental lost some exclusive rights. Romano lost an exclusive right to sell a certain brand of wine, and Continental lost an exclusive right to sell Gordon's Vodka in Cook County and the right to distribute various wines. If Romano and Continental had as much influence with Renfield as Valley claims they had, it is difficult to imagine why they would have agreed to such distasteful curtailments of their rights.

Valley also notes that Valley was Renfield's best-selling distributor among the three competing distributors and that Renfield's sales in Illinois declined 21% in the year following the realignment, and asserts that these facts should lead to the inference that Renfield terminated Valley after conspiring with Romano and Continental. We agree with the district judge, however, that this demonstrates "at most" that "Renfield exercised bad business judgment in its realignment." That Renfield was "punished" for its decision through subsequent poor sales does not mean it connived with or was influenced by the distributors in making the decision. Renfield's realignment was statewide and Valley was not terminated from the statewide scheme—as the district court noted, "Valley actually *gained* exclusive rights in five counties."

Moreover, Valley has not raised an inference that Renfield conspired with Romano and Continental *to fix prices*. In *National Marine Electronic Distributors, Inc. v. Ray-*

theon Co., 778 F.2d 190, 192-93 (4th Cir. 1985), the Fourth Circuit affirmed a directed verdict for a defendant who had terminated its relationship with the plaintiff dealer, stating that although price complaints played a part in the decision to terminate the plaintiff, the plaintiff had not introduced sufficient evidence to raise an inference that there was an "agreement to set, control, fix, maintain, or stabilize prices." There was no agreement because the defendant did not require dealers to sell at any particular price, and the dealers set their own prices, competing with other dealers of the defendant and with dealers who sold competing brands of similar products. *Id.* at 193.

This case is similar. Renfield may have suggested various prices at which to sell its products, but the presidents of both Romano and Continental testified in depositions that Renfield never threatened that they would be terminated as Renfield's distributors if they did not sell at those suggested prices. In addition, a Valley representative admitted that Renfield never asked Valley to maintain a certain price level. The evidence indicates that although Valley was a price-cutter the dealers set their own prices, and indeed all undercut each others' prices at various times. Even if Valley could show a conspiracy to terminate Valley, it has failed to allege facts that would raise an inference that Renfield, by terminating Valley's distribution rights in three Chicago-area counties, agreed with Romano and Continental to set or control prices.

Valley repeatedly argues that Renfield did not ever give an independent business reason for modifying Valley's distribution rights and thus asks us to infer that the only reason was to fix prices with Romano and Continental. Indeed, Valley maintains that Renfield's own expert conceded that Renfield's decision was not independent. During depositions Valley asked Renfield's expert, John P. Gould, Jr., an extended hypothetical question based on the facts of this case.[6] Gould was then asked whether he

[6] Specifically, Valley described a situation in which a manufacturer was receiving price complaints from two of its three dis-

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could conclude that the decision to terminate did *not* result from an independent action by the manufacturer. Gould's response is significant. He stated that

> the problem I always have with hypothetical rather than dealing with specific cases is that no matter how long the set of assumptions go, there is probably going to be some other circumstances that could come into [sic] affect the decision . . . . I can point out that if you're saying is my imagination sufficiently accurate to think of a circumstance in which this could happen in which the manufacturer would have decided independently to do it, the answer is yes, I can think if [sic] a case like it.

Gould was further questioned, "Could you also think of a case where he would not have?" He responded, "Yes, I could think of that, too." We agree with Renfield that this is an equivocal response. It cannot support Valley's contention, repeated often in its brief, that Renfield's own expert "conceded" that a trier of fact could conclude that Renfield did not exercise independent business judgment.

Valley further contends that Renfield "disavowed all the hypotheses" for the modifications of Valley's rights advanced by this court in our opinion in *Valley I.* There, we suggested that one independent business reason for terminating Valley might be to eliminate possible free-riding problems.[7] *Valley I,* 678 F.2d at 743-44. Valley's expert testified that two economic theories that would

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[6] *continued*

tributors regarding the third distributor's undercutting of price, the third not being a "free rider" or a "cherry picker." The third distributor was terminated, sales decreased, and the two complaining distributors continued to sell at the same or higher prices.

[7] Free riders are those retailers who do not engage in promotional activities such as advertising or provide service and repair facilities, while those services are performed by other retailers. *See Continental T. V., Inc. v. GTE Sylvania Inc.;* 433 U.S. 36, 55 (1977).

provide reasons for terminating Valley—if Valley were a "free rider" or a "cherry picker"[8]—make no economic sense in this situation, and indeed, there is no evidence that Valley was a free rider or a cherry picker.

We did not mean to say in *Valley I*, however, that the only independent business reason with legitimacy would be to eliminate free riding. There could be a variety of business reasons why Renfield might terminate Valley. *See, e.g., Souza v. Estate of Bishop*, 799 F.2d 1327, 1329-30 (9th Cir. 1986) (defendants' decision to lease rather than sell lands to plaintiffs was based on "understandable and legitimate business reason" of avoiding unfavorable tax consequences); *Garment District, Inc. v. Belk Stores Services, Inc.*, 799 F.2d 905, 909 (4th Cir. 1986) ("legitimate, independent reasons for terminating a discounter in response to dealer complaints" include a desire "to avoid losing the business of disgruntled dealers"); *O.S.C. Corp. v. Apple Computer, Inc.*, 792 F.2d 1464, 1468 (9th Cir. 1986) (defendants' explanation for terminating plaintiff mail-order distributor, which was to comply with defendants' policy of selling only by face-to-face transactions and not through mail-order sales, was "plausible and justifiable" and "consistent with proper business practice"); *National Marine Electronic Distributors, Inc. v. Raytheon Co.*, 778 F.2d 190, 191 (4th Cir. 1985) (defendants terminated plaintiff distributor, a mail-order company, after reexamining its market structure and deciding not to pursue mail-order sales); *Burlington Coat Factory Warehouse Corp. v. Esprit de Corp.*, 769 F.2d 919, 921-22 (2d Cir. 1985) (defendant terminated plaintiff distributor after implementing retail marketing procedures that distributor did not follow and after deciding to reduce the number of retailer/distributors); *Terry's Floor Fashions, Inc. v. Burlington*

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[8] A cherry picker is a distributor that exploits only the easiest accounts or the best-selling items of a full line of products, ignoring accounts that are more costly or difficult to serve. A desire to avoid cherry pickers is often a reason given for exclusive distributorships.

Industries, Inc., 763 F.2d 604, 614 (4th Cir. 1985) (defendant's decision to terminate plaintiff distributor was consistent with defendant's independent marketing strategy of giving certain dealers a price incentive to promote defendant's product and with defendant's antibootlegging policy); *Blair Foods, Inc. v. Ranchers Cotton Oil*, 610 F.2d 665, 671-72 (9th Cir. 1980) (defendants' decision to deny credit to plaintiff was "unilaterally determined" and "amply justified by legitimate business considerations" as plaintiff had a poor payment record, repeatedly proffered bad checks, failed to return phone calls, and refused to meet to discuss the balance due). As we stated in *Valley I*, "we are just concerned with whether Renfield may have had reasons for terminating Valley that were independent of the desires of Continental and Romano to be rid of the competition of a price-cutter." *Valley I*, 768 F.2d at 744. Any of those independent reasons would suffice to create an inference of independent action by Renfield.

Despite Valley's assertions to the contrary, Renfield did proffer a reason for the realignment. Renfield's Senior Vice President, Ponti Campagna, said on deposition that the company merely decided to reduce the number of distributors across the board. Campagna stated:

> My actual choice was made for Romano Brothers and for Continental because of the following circumstances: The combined manpower total of Romano Brothers and Continental was greater than the combined manpower of any other combination. I had to make sure that with the increased volume the distributors were receiving and the increased profitability, that we maintained coverage because that was a critical part of our problem.
>
> I explained to you that Valley had a portion of Cook County while the Romano Brothers and Continental had Cook, DuPage, Lake and McHenry; so I really considered them having a greater responsibility throughout their entire tenure of Renfield than Valley did. I felt that the combined portfolios of Romano

> Brothers and Continental might be more beneficial to Renfield, the meld of brands. We compete for business with the distributor in-house. The distributor has salesmen, has a selection of brands to sell. He has other gins to sell, other vodkas to sell, other wines to sell; so I am competing within the house, also. I felt that, in my opinion, that the two distributors, Continental—because of Continental's length of time in the marketplace, their reputation, and the fact that Romano Brothers were very hungry and they needed our line probably more than any other distributor from the standpoint of balance of their portfolio, would give me a better chance to succeed in that marketplace over the long haul. It wasn't a question, sir, of terminating a distributor for lack of performance; it was a question of reducing the total number of distributors in the marketplace. And since it had to go from four to two, it came down to a judgment call, whether [I] made the right decision or wrong decision.

We find Campagna's reason is plausible and sufficient to create an inference that Renfield acted independently. We hasten to note that Renfield does not have to prove that it actually had an independent reason. Under the *Monsanto* standard, it is up to the nonmovant, in this case Valley, to present evidence "that tends to exclude the possibility" that defendant Renfield acted independently. *Monsanto*, 465 U.S. at 764. It follows that because Renfield has advanced Campagna's testimony, which leads to an inference of independent action, Valley must refute that inference to succeed.

Valley attempted to refute Renfield's independent business reason through the testimony of its expert, Joseph R. Gunn III.[9] Gunn stated that "the only reason offered

[9] Although Gunn specifically states that he has been asked to examine whether Renfield possessed market power and whether Renfield's conduct tended to reduce competition, which are issues relating to Count II and not to Count I, he nonetheless attempts to discredit Campagna's reason for the termination.

by Mr. Campagna was a statement of his judgement [sic], based on available sales forces." Gunn then criticizes the basis for Campagna's reason, noting that Campagna "later stated that his calculation had not been made by comparing the several distributors." We need not determine whether Gunn's criticism is valid because a close reading of Campagna's testimony reveals that the sales force issue was only one aspect of Campagna's reasoning. Campagna also stressed that Romano and Continental covered a larger geographical area in the metropolitan Chicago area than did Valley, and that the portfolios of Continental and Romano would be more beneficial to Renfield than would Valley's portfolio. Campagna apparently based his decision on the distributors' capacity for future sales and not necessarily on current sales figures. His testimony suggests that he looked to the strengths of Romano and Continental rather than to the weaknesses of Valley. Valley has provided no evidence, either through expert testimony or otherwise, to refute these aspects of Campagna's decision and thus has failed to exclude the possibility that Renfield acted independently.

Valley finally attempts to argue that various cases on which the district court relied in granting summary judgment instead mandate reversal. Valley asserts that in *Burlington Coat Factory Warehouse Corp. v. Esprit de Corp.*, 769 F.2d 919, 921-22 (2d Cir. 1985) the terminated distributor engaged in free riding, and in that case and in *Terry's Floor Fashions, Inc. v. Burlington Industries, Inc.*, 763 F.2d 604, 614 (4th Cir. 1985), the manufacturer exercised an independent business decision in terminating the distributor.[10] Valley maintains that those cases are

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[10] Valley also attempts to distinguish *Reborn Enterprises, Inc. v. Fine Child, Inc.*, 590 F. Supp. 1423 (S.D.N.Y. 1984), *aff'd*, 754 F.2d 1072 (2d Cir. 1985). Valley has mischaracterized *Reborn*. Valley asserts that the district court mistakenly relied on this case because there was evidence in *Reborn* that plaintiff was a free rider and because the plaintiff's president's "churlish behavior," which included persistent threats of suit, provided an independent

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therefore distinguishable from this case. We disagree with Valley's application of the cases. Although there is no evidence that Valley was a free rider, as we noted above Renfield did have independent business reasons for modifying Valley's distribution rights, and Valley has not shown that an inference of conspiracy is reasonable in light of those independent business reasons.

Valley's allegations of price complaints and meetings between Renfield and Renfield's other two distributors are insufficient to create an inference of conspiracy to fix prices. Even if we were to find an inference of conspiracy, such an inference would be unreasonable considering Renfield's proffered independent business reason for modifying Valley's distribution rights. The district court thus properly granted Renfield summary judgment on Count I of the amended complaint.

B. Count II—Unreasonable Restraint of Trade

Valley argues that the district court improperly granted summary judgment on Count II of its amended complaint, which alleged that Renfield's decision to modify Valley's

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[10] *continued*

reason for the defendant to terminate the plaintiff. The *Reborn* court, however, did not discuss either of these factors in relation to the section 1 vertical price-fixing conspiracy claim. The *Reborn* court stressed the plaintiff's president's churlish behavior as a justification for the plaintiff's termination in the context of a discussion of vertical territorial restrictions under the Rule of Reason analysis. *See id.* at 1441-42. The *Reborn* court might have considered this independent business reason for termination in its vertical price-fixing conspiracy analysis if it had had the chance. It did not, however, reach that issue because it found that the plaintiff did not provide the probative evidence beyond that of complaints and termination necessary to satisfy the *Monsanto* test. Specifically, the court held that the plaintiff did not "advance sufficient evidence to raise a genuine dispute as to whether defendants engaged in coercive activity to force adherence to its suggested retail price and plaintiffs and other retailers actually adhered to that price." *Id.* at 1439.

distribution rights was an unreasonable restraint of trade in violation of section 1 of the Sherman Act. Such an allegation is appropriately analyzed under the Rule of Reason as set out by the Supreme Court in *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977). *See* Pitofsky, *The* Sylvania *Case: Antitrust Analysis of Non-Price Vertical Restrictions*, 78 Colum. L. Rev. 1 (1978); *cf.* Posner, *The Rule of Reason and the Economic Approach: Reflections on the* Sylvania *Decision*, 45 U. Chi. L. Rev. 1 (1977). A threshold inquiry in any Rule of Reason case is whether the defendant had market power, that is, the "power to raise prices significantly above the competitive level without losing all of one's business." *Valley I*, 678 F.2d at 745; *see Assam Drug Co. v. Miller Brewing Co.*, 798 F.2d 311, 315-16 (8th Cir. 1986); *Hennessy Industries, Inc. v. FMC Corp.*, 779 F.2d 402, 404-05 (7th Cir. 1985); *Polk Bros., Inc. v. Forest City Enterprises, Inc.*, 776 F.2d 185, 191 (7th Cir. 1985); *Brunswick Corp. v. Riegel Textile Corp.*, 752 F.2d 261, 265 (7th Cir. 1984), *cert. denied*, 105 S. Ct. 3480 (1985); *General Leaseways, Inc. v. National Truck Leasing Association*, 744 F.2d 588 (7th Cir. 1984) (collecting cases). Valley here attacks a vertical nonprice restraint. Only if Valley can allege facts that give rise to an inference that Renfield had sufficient market power to control liquor prices must we proceed to the first step in the Rule of Reason analysis, which is to balance the effects the vertical restraint has on intrabrand and interbrand competition. The restraint is unreasonable if "weighing effects on both intrabrand and interbrand competition, [the restriction] made consumers worse off." *Valley I*, 678 F.2d at 745.

We need not reach the first step because the district court correctly found that Valley has not alleged facts that give rise to an inference that Renfield had sufficient market power to control liquor prices in a relevant product and geographic market.

Market power is "normally inferred from the possession of a substantial percentage of the sales in a market carefully defined in terms of both product and geography."

Id. Valley and Renfield agree that the product market is distilled spirits and wines. Regarding the relevant geographical market, Valley asserts that it is the metropolitan Chicago area (including the counties of Cook, McHenry, and DuPage, wherein Valley was a Renfield distributor). Renfield disagrees, stating that it is the state of Illinois at a minimum and the entire country at a maximum. It does not matter which market we use, because as the below analysis shows, Renfield does not have market power in any of those markets.

The central issue is thus whether Renfield possesses a "substantial percentage of the sales" of distilled spirits and wines in either the metropolitan Chicago area or the state of Illinois or the nation as a whole. Market share analyses in section 1 cases have led to conclusions that approximately 70%-75% of market share constitutes market power, *see Graphic Products Distributors, Inc. v. Itek Corp.*, 717 F.2d 1560, 1570 (11th Cir. 1983) and that a 20%-25% market share or less does not constitute market power, *see Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 221 (D.C. Cir. 1986) (5%-6% market share), *cert. denied*, 55 U.S.L.W. 3473 (1987); *Assam Drug Co. v. Miller Brewing Co.*, 798 F.2d 311, 318 & n.18 (8th Cir. 1986) (approximately 19% market share); *O.S.C. Corp. v. Apple Computer, Inc.*, 601 F. Supp. 1274, 1291 n.8 (C.D. Cal. 1985) (up to 20% market share and existence of substantial competition), *aff'd*, 792 F.2d 1464 (9th Cir. 1986); *Donald B. Rice Tire Co. v. Michelin Tire Corp.*, 483 F. Supp. 750, 761 (D. Md. 1980) (20%-25% market share), *aff'd*, 638 F.2d 15 (4th Cir.), *cert. denied*, 454 U.S. 864 (1981). It is also helpful to analogize to section 2 monopoly cases in determining a benchmark figure for "substantial percentage of the sales." In both section 1 and section 2 cases, the purpose of establishing market power is to determine whether the defendant can control the market and thus affect competition. It would therefore appear that the percentages of sales necessary to establish a substantial market share should be relatively comparable. In section 2 monopoly cases, a substan-

tial percentage of the sales is usually at least 50%. *Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 732 F.2d 480, 489 & n.11 (5th Cir. 1984); *see also Dimmitt Agri Industries, Inc. v. CPC International, Inc.*, 679 F.2d 516, 529-30 (5th Cir. 1982) (market share percentages on the order of 25% could not, as a matter of law, support a monopolization claim, at least not in the absence of "other compelling structural evidence"), *cert. denied*, 460 U.S. 1082 (1983); *Broadway Delivery Corp. v. United Parcel Service of America, Inc.*, 651 F.2d 122, 129 (2d Cir.) (presumption that market share below 50% in the absence of other indications of market power sufficient to create a genuine jury issue should lead to summary judgment or directed verdict), *cert. denied*, 454 U.S. 968 (1981); P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 518.3c (Supp. 1986) ("there is substantial merit in a presumption that market shares below 50 or 60 percent do not constitute [market] power"). Without a showing of special market conditions or other compelling evidence of market power, the lowest possible market share legally sufficient to sustain a finding of monopolization is between 17% and 25%. *Domed Stadium*, 732 F.2d at 490.

Valley does not dispute that Renfield's market share in the metropolitan Chicago area is less than 2%, or that Renfield's market share in the state of Illinois or the entire country is between 2%-3%. This figure is miniscule compared to the 50% usually necessary to constitute a substantial percentage, or even to the 17%-25% which is an absolute minimum necessary to establish market share. Based on these figures, Valley cannot raise a genuine issue of material fact regarding Renfield's market power. Renfield does not have sufficient market share to have the market power necessary to affect prices and therefore harm competition.

Valley argues, however, that market share analysis is a "misleading" criterion of market power. Valley cites a law review article coauthored by then-Professor, now-Judge Richard Posner that states that market share analysis, by itself, is misleading. *See* Landes & Posner, *Market Power*

in Antitrust Cases, 94 Harv. L. Rev. 937, 947 (1981). We find that Valley's characterization of that statement is itself misleading. Valley has taken the statement "market share alone is misleading" out of the context of the Landes and Posner article. In that article, Landes and Posner offer a formula for market power in which market share is one of three separate factors, the other two being "the market elasticity of demand" and the "elasticity of supply of competing or fringe firms." *Id.* at 945. Thus Landes and Posner conclude that "inferences of power from share alone can be misleading." *Id.* at 947. They also note, however, that these elasticities are "not easily determinable (at least by the methods of litigation)" and even when it is possible to estimate the elasticities, it is difficult to choose the proper period of time in which to estimate them. *Id.* at 956. An alternative approach in "determining market power when elasticities are unknown," according to Landes and Posner, "is to use 'guesstimates' of elasticities in defining market in the first place." *Id.* at 970. The adjustments for elasticities are made when the market is carefully defined in terms of product and geography, before market share is determined. Market share and ultimately, market power, will thus differ depending on whether the market is more narrowly or more broadly defined in either product or geographical terms. *Id.* at 960-67. Accordingly, when in *Valley I* Judge Posner defined "market power as the possession of a substantial percentage of the sales in a market carefully defined in terms of both product and geography," *Valley I*, 678 F.2d at 745, he was taking into account "guesstimates" of the elasticity factors that make market share, which alone may be misleading, a more reliable indicator of market power.

Valley may actually be arguing that the market share analysis is "misleading" because it is imprecise. That may very well be the case, because the demand and supply elasticities are only "guesstimated" by defining the market carefully, but Valley has not offered any figures for those elasticities that would make the market share analysis more accurate. Valley may have recognized that

such figures would not have been helpful to show market power in this case. The undisputed market share of Renfield in the metropolitan Chicago area, Illinois, or the entire country is so small that it would not seem worthwhile to go to the trouble and expense of computing those figures. We can conceive of a case in which it would be helpful to have, if available, precise figures for supply elasticity and market elasticity of demand along with market share in the market power calculation. That type of case would involve a significantly higher market share—one that borders on the amount "minimally necessary" to establish market power. That situation is not present here. Those elasticity figures would not assist Valley in raising a genuine issue of material fact with respect to Renfield's market power.

Based on their argument that market share analysis is misleading and on our implication in *Valley I* that Valley might have tried to establish market power by means other than market share, *see Valley I*, 678 F.2d at 745, Valley attempts in vain to create an inference of market power by other means. Valley focuses on Judge Posner's definition in *Valley I* of "market power" as "the power to raise prices significantly above the competitive level without losing all of one's business." *Id.* We note initially that Valley is faced with a difficult task. Absent an analysis of market share, market power "can rarely be measured directly by the methods of litigation," *id.*, and "its measurement requires sophisticated econometric analysis." *Graphic Products Distributors, Inc. v. Itek Corp.*, 717 F.2d 1560, 1570 (11th Cir. 1983). *See* Landes & Posner, *supra*, at 957-58 (other approaches include estimating a firm's marginal cost and comparing that to the price it is charging, and using multiple regression techniques to determine the impact of market share on price).

Valley asserts that it has succeeded in raising an inference that Renfield has market power, citing testimony by Renfield employees Sussman and Campagna that Renfield can raise its prices on a per bottle basis by as much as $.50 or $1.00 and Renfield will not lose all of its sales,

and testimony by Sussman that there was no price at which Gordon's Vodka and Gordon's Gin would *not* sell because the products did not sell on price alone. These employee statements, however, are insufficient to raise a genuine issue of material fact regarding Renfield's market power.

Campagna stated at another point that substantial price increases could "kill" some Renfield brands and consumers might then "walk away" from Renfield products. Furthermore, regarding Valley's claim that Renfield could raise its prices $.50 or $1.00 per bottle and still not lose sales, we agree with the district court that "[w]e have no evidence before us as to what a competitive price is for these products—perhaps a $.50 to $1.00 rise in price still keeps the product in a competitive price range."

Valley also proffers evidence that *Impact* magazine identified Renfield as the ninth largest national importer or distiller of alcoholic beverages, that Renfield was cited by a Renfield employee as one of the six largest national importers in the Chicago metropolitan area, and that two of Renfield's products, Gordon's Gin and Gordon's Vodka, are among the nation's twenty most popular brands of alcoholic beverages. These facts alone are meaningless. They do not indicate Renfield's ability to raise prices without losing its business. Renfield may be the ninth largest national importer and one of the six largest national importers in the Chicago area, but there must be other importers and suppliers who do a substantial business. Valley has not disputed that Renfield has 2%-3% of the market share in the metropolitan Chicago area or the nation. Other importers or suppliers, no matter what their size, would likely have the ability to take business away from Renfield if it raised its prices. To make the above figures significant, Valley would have to raise an inference that customers showed some loyalty to the Renfield brand. Renfield representatives testified, however, that brand loyalty in distilled spirits is negligible. Furthermore, as the district court has noted, "Valley has not denied that consumers find one brand of gin or vodka highly substitutable with another."

Valley has not supplied even the basic facts and figures necessary to render the employees' statements and Renfield's size meaningful, let alone a sophisticated econometric analysis normally necessary to show market power. Valley has therefore failed to allege facts to raise an inference that Renfield had market power at the time of Renfield's realignment. Thus Valley has not met the threshold test we articulated in *Valley I*—that the plaintiff show that the defendant has significant market power.

Valley attempts to sidestep its difficulty in creating an inference of Renfield's market power by asserting that the proper test of illegality should be based not on market power, but rather on the balancing of effects on interbrand and on intrabrand competition. This attempt to skirt the market power issue is disingenuous. As we stated in *Valley I*, a determination of market power is necessary before proceeding to the balancing of a restriction's effects on interbrand and intrabrand competition. Because Valley has failed to raise a genuine issue of material fact regarding Renfield's market power, we need not proceed to the first step of balancing the effects on intrabrand and on interbrand competition to determine whether Renfield's restraint was unreasonable. We can at this point affirm the district court's grant of summary judgment on Count II of Valley's amended complaint.

C. Count III—Breach of Contract

Valley contends that the district court erred in granting summary judgment for Renfield on Count III of Valley's amended complaint, which alleged that Renfield breached its written distributorship agreement with Valley. Specifically, Valley argues that there are genuine issues of material fact as to whether Renfield's decision to modify Valley's distribution rights was made in bad faith and regarding whether ten days' notice of termination was insufficient, especially considering that the agreement had existed twenty-six years.

We disagree with both arguments. Valley has conceded that the distributorship agreement between Valley and Renfield specifically provided that Renfield had the right to terminate Valley "at any time and for any reason" on written notice. Renfield's decision fell within its power under the explicit terms of this written contract. That explicit language alone justifies Renfield's decision to modify Valley's distribution rights with ten days' notice.

Valley nonetheless maintains that Renfield's discretion is bounded by standards of reasonableness and that Renfield has acted unreasonably. Valley argues that because Renfield terminated Valley immediately before the winter holiday season, on ten days' notice, and after a twenty-six year distributor relationship, the realignment was made in bad faith.

Valley cites two cases, *Frank Coulson, Inc.—Buick v. General Motors Corp.*, 488 F.2d 202 (5th Cir. 1974), and *Rao v. Rao*, 718 F.2d 219 (7th Cir. 1983), to support its argument that Renfield has terminated Valley in bad faith. Neither case, however, is apposite. In *Frank Coulson*, the court rejected defendant General Motors' claim that it possessed an absolute privilege to intervene regarding the sale price of the Frank Coulson car dealership, stating that "GM's privilege to intervene as to the dealer's sale price is similarly limited to justifiable business interests." *Frank Coulson*, 488 F.2d at 207. Valley relies on this case to argue that Renfield had no legitimate business interest in terminating Valley without fair and adequate notice. *Frank Coulson* dealt with the scope of a privilege to interfere with a prospective contractual relationship. In this case, however, Renfield has not intervened in a relationship between Valley and a third party. Renfield has not imposed restrictions on Valley regarding retail pricing or a prospective sale of Valley's assets or stock. Valley cannot rely on *Frank Coulson* to impose a requirement of "justifiable business interest" on Renfield.

Valley also cannot rely on *Rao v. Rao,* 718 F.2d 219 (7th Cir. 1983). In *Rao,* Hari Rao, a surgeon, and the Mohan Corporation (Mohan), a medical service corporation, had an employment contract that provided that at the completion of four years of service, Hari was entitled to purchase 50% of Mohan's shares for one dollar. The agreement also provided that the employment relationship could be terminated by either party on ninety days' notice and contained a restrictive covenant whereby if Hari's employment was terminated "for any reason," Hari could not practice medicine at various hospitals in the community for a few years. Hari was sent a notice of termination on December 21, 1979, that became effective in ninety days, which not so coincidentally happened to be ten days before Hari would have obtained a 50% interest in Mohan for a dollar. The letter also included an invitation to negotiate a "new relationship" between the corporation and Hari. The district court found that Hari was a competent surgeon and a good employee and that his employment was terminated because Mohan did not want Hari to exercise his contractual right to obtain a 50% interest in the corporation. The court therefore held that although the explicit terms of the contract allowed Mohan to terminate Hari's employment and enforce the restrictive covenant, Mohan breached an implied promise of good faith by enforcing the restrictive covenant.

Rao is easily distinguished from this case. In *Rao,* the court of appeals accepted the district court's finding that there was sinister motive behind the termination—to prevent Rao from exercising his contractual right to obtain a 50% interest in the corporation. In this case, Valley has not raised an inference of conspiracy or any other type of sinister motive on Renfield's part. Renfield's decision to realign did not affect Valley alone, but was done as part of a statewide realignment plan. Renfield's decision was not designed to divest Valley of benefits that Valley would otherwise soon gain—as we noted earlier in our analysis of the conspiracy claim, Renfield had a legitimate independent business reason for modifying Valley's distri-

bution rights. Finally, the *Rao* court seemed to have been most displeased with Mohan's attempt to invoke the restrictive covenant after the termination. The restrictive covenant prevented Rao from obtaining employment with other hospitals in the area and the court seemed particularly distressed that Mohan exercised such power by terminating "for any reason." Renfield had no such restrictive covenant with Valley—Valley is not precluded from seeking other distributorships, and indeed, works as a Renfield distributor in counties other than those in the metropolitan Chicago area.

"Bad faith" is defined as "generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive." *Black's Law Dictionary* 127 (5th ed. 1979); *see MCI Communications Corp. v. American Telegraph & Telephone Co.*, 708 F.2d 1081, 1159 n.116 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983). To succeed, Valley would have had to allege facts showing an inference of Renfield's actual or constructive fraud or sinister motive. As we have stated earlier, Valley has failed to do so. "[B]ad faith is not synonymous with erroneous judgment." *Foster Enterprises, Inc. v. Germania Federal Savings and Loan Association*, 97 Ill. App. 3d 22, 421 N.E.2d 1375, 1381 (3d Dist. 1981). Valley can allege at most that Renfield made a bad business decision in eliminating Valley from three counties in the metropolitan Chicago area.

Valley's final argument is that Renfield breached its distributorship contract with Valley by providing only ten days' notice before modifying Valley's distribution rights. Valley concedes that the contract does not specifically require any set time period of notification prior to termination, but argues that ten days' notice is insufficient given the length of the distributorship relationship "and efforts expended by Valley over many years to establish Renfield's products in the market." Valley cites *Colony Liquor Dis-*

tributors, Inc. v. Jack Daniel Distillery–Lem Motlow Prop., Inc., 22 A.D.2d 247, 254 N.Y.S.2d 547 (1965) in support of its argument. At first blush, the facts in *Colony* seem quite similar to those of this case. Colony had provided forty-five days' notice of its termination as a distributor for Jack Daniel's, after it had served as its exclusive distributor for a twenty-one county area in northeast New York for eleven years. The *Colony* court concluded that Jack Daniel's gave Colony insufficient notice and that Colony should be entitled to remain as distributor for eighteen months. The *Colony* court, however, was faced with an oral understanding, rather than a written contract between the parties. Because the duration of the contract and notice provisions were not in writing, the court held that the duration should be reasonable, and so could be terminated on reasonable notice. *Id.* at 549-50. In this case, there is a written contract that is explicitly terminable at will. We need not read into the agreement terms we believe the parties might have agreed upon had they written out the contract.

Furthermore, Illinois law is contrary to the *Colony* case, which was decided under New York law. " 'It has long been the holding of the Illinois courts that when an executory contract fixes no time for its operation, it is terminable at the will of either party' and without notice." *Uptown People's Community Health Services Board of Directors v. Board of Commissioners*, 647 F.2d 727, 737 (7th Cir. 1981) (quoting *Kraftco Corp. v. Kolbus*, 1 Ill. App. 3d 635, 274 N.E.2d 153, 156 (4th Dist. 1971)), *cert. denied*, 454 U.S. 866 (1981). In *Kraftco*, 274 N.E.2d at 156-57, the court cited several cases, noting that notice was not given in most of those cases, and concluded that "notice would not appear necessary." The court also noted, and rejected, the argument that "reasonable notice should be required under such circumstances." *Id.* at 157. We find that under Illinois law ten days' notice is sufficient.

Valley's case is even less sympathetic because Valley knew of the proposed distributor realignment, which

might result in profound changes in Valley's rights, as early as July of 1981, a full four months before Renfield informed Valley of the actual realignment. Renfield had informed Valley and the other distributors in July that the end result of the realignment would probably be exclusive or dual distributorships in each of the counties in the state. At that time Valley shared Renfield distribution rights with one or more other distributors. Valley cannot assert that it had no warning of the realignment.

III. CONCLUSION

For the foregoing reasons, we find that Valley has failed to raise genuine issues of material fact regarding its claims that Renfield conspired to fix prices, unreasonably restrained trade, and breached its distributorship agreement with Valley. We therefore affirm the district court's grant of summary judgment on all counts.

AFFIRMED

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 81 C 6285 Date: DEC 31 1985

Name of Assigned Judge: JOHN F. GRADY

Case Title: Valley v Renfield

* * * * *

DOCKET ENTRY:

(1) ☐ Judgment is entered as follows:

(2) ☒ [Other docket entry:]

ENTER MEMORANDUM OPINION. Defendant's motion for summary judgment is granted.

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

VALLEY LIQUORS, INC.,

Plaintiff,

No. 81 C 6285 v.

RENFIELD IMPORTERS, LTD.,

Defendant.

MEMORANDUM OPINION

This antitrust case is before us on the motion of defendant Renfield Importers, Ltd. ("Renfield") for summary judgment on all three counts of plaintiff's complaint. For the reasons given below, Renfield's motion is granted.

FACTS

Defendant Renfield is a supplier of distilled spirits and wine. Pursuant to various distribution agreements, it sold its liquor to wholesale distributors, including plaintiff Valley Liquors, Inc. ("Valley"), and non-parties Romano Brothers Beverage Co. ("Romano") and Continental Distributing Co., Inc. ("Continental"). In turn, these distributors sold to retailers, who sold the liquor to consumers.

In 1981, Renfield decided to realign its distribution system in Illinois to reduce the number of its distributors in each county. Before that date Renfield had sold to several wholesalers in each county; after the realignment, it sold to only one or at most two distributors in each county. Before the realignment, Valley had the exclusive right to distribute Renfield's products in Jo Daviess, Stevenson, Winnebago, Carroll, DeKalb, Boone and Ogle counties, and

the non-exclusive right to sell in Lee, Bureau, Whiteside, Kane, Kendall, McHenry, DuPage and part of Cook counties. After the realignment, Valley retained its exclusive right as to the first seven counties, and acquired an exclusive right to sell in Lee, Bureau, Whiteside, Lane and Kendall counties. It lost its right to sell in McHenry, DuPage and Cook counties. In these three counties before the realignment, Valley sold Renfield's products along with Romano and Continental; after the realignment, only Romano and Continental had the right to sell Renfield's product.[1]

Renfield has explained, through the deposition testimony of its representatives, that it realigned in general because its sales in Illinois had not been growing as rapidly as in the rest of the country, and that it believed that its new alignment reducing the number of its distributors would result in a more efficient and accountable system. Renfield has explained that the decision regarding Valley was made because Romano and Continental had bigger sales forces in McHenry, DuPage and Cook counties; Romano and Continental were carrying a preferable portfolio of Renfield's products; Continental was an old, established distributor with an excellent reputation; and Romano had a greater need for Renfield's products, and, therefore, a greater motive to sell them. Renfield's Supplemental Memorandum in Support of Defendant's Motion for Summary Judgment at 14, citing Campagna Dep. at 66-68.

Valley disputes this explanation, and claims that it was removed from McHenry, DuPage and Cook counties because it sold Renfield's liquor at a lower price than Romano and Continental. In Count I of its complaint, Valley alleges that Renfield, Romano and Continental conspired to fix prices in violation of the Sherman Antitrust Act, 15 U.S.C. § 1; in Count II, Valley alleges that Renfield's decision to restrict Valley's geographical allocation was an unreasonable restraint of trade, also in violation of § 1; and in Count III, Valley claims that by removing it from these three counties, Renfield breached its distribution agreement with Valley.

PROCEDURAL HISTORY

Initially, Valley moved for a preliminary injunction against Renfield's removal of Valley from these three counties, which we denied, based on Valley's failure to demonstrate that it was likely to win the case at trial. The Seventh Circuit affirmed our decision, holding that Valley had failed to sufficiently demonstrate a conspiracy, and had not shown that Renfield had the market power to restrain trade. *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 678 F.2d 742 (7th Cir. 1982).

DISCUSSION

Count I—Conspiracy

It is blackletter antitrust law that a plaintiff must prove concerted activity in order to succeed in a § 1 claim. Section 1 only prohibits concerted activity—"contract[s], combination[s] and conspirac[ies]." Therefore, under § 1, a business generally has the right to deal or refuse to deal with whomever it likes, for whatever reason, as long as it is acting independently. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, ___ U.S. ___, ___ n. 27, 105 S.Ct. 2847, 2857 n. 27 (1985), *citing Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. ___, ___, 104 S.Ct. 1464, 1469 (1984), and *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919). *See also Roland Machinery Co. v. Dresser Industries*, 749 F.2d 380, 393 (7th Cir. 1984) (unilateral conduct not actionable under § 1); *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101. 1107 n. 4. (7th Cir. 1984) (same).

Here, Valley is alleging a conspiracy among Renfield, Romano and Continental to fix prices. Such conduct is a *per se* antitrust violation; that is, if a plaintiff proves such a conspiracy, the court presumes that the defendant's conduct harmed competition. Therefore, in order to prove the allegations made in Count I, Valley must demonstrate (1) a conspiracy to (2) violate antitrust laws.

In *Monsanto*, the Supreme Court discussed what type of proof a plaintiff must produce in order to survive a defendant's summary judgment motion in a distributor-termination case.[2] It is not enough for a plaintiff distributor to prove that fellow distributors protested the plaintiff's low prices and that the plaintiff's termination followed. *Monsanto*, 465 U.S. at ___, 104 S.Ct. at 1470. This is because it is natural for distributors to complain about the prices offered by their fellow distributors, and because manufacturers and distributors must maintain communication and coordination in order to sell their product efficiently:

> In sum, "[t]o permit the inference of concerted action on the basis of receiving complaints alone and thus to expose the defendant to treble damage liability would both inhibit management's exercise of independent business judgment and emasculate the terms of the statute.

Id. at ___, 104 S.Ct. at 1471, *quoting Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 111 n. 2 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981).

Instead, a plaintiff must present evidence that tends to exclude the possibility that the manufacturer (here, the supplier) and nonterminated distributors were acting independently. *Id.* at ___, 104 S.Ct. at 1471. He must demonstrate that the manufacturer and other distributors "had a conscious commitment to a common scheme designed to achieve an unlawful objective"; circumstances must reveal "a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement." *Id.*, 104 S.Ct. at 1471, *quoting Sweeney*, 637 F.2d at 111, and *American Tobacco Co. v. United States*, 328 U.S. 781 (1946).

Applying this test to the facts in *Monsanto*, the Court did find sufficient evidence of a conspiracy to survive summary judgment. The plaintiff produced substantial direct evidence of an agreement to maintain prices in the form of testimony that the defendant manufacturer approached

price-cutting terminators and advised them that if they did not maintain the suggested resale price they would not receive adequate supplies of the defendant's new product. There was further evidence that the defendant compelled a recalcitrant distributor to comply with its pricing system. The Court also cited a newsletter from one of the distributors to his dealer-customers written shortly after a meeting between the distributor and the defendant. In the newsletter, the distributor discussed the defendant's efforts to "get the market place in order" and that the defendant had assured the distributors that price levels would be maintained. The Court further held that there was sufficient evidence that the plaintiff was terminated pursuant to this price-fixing agreement, because following the termination, the plaintiff and defendant met, and the first thing the defendant mentioned was the many complaints the defendant had received about plaintiff's prices. Prior to termination, the defendant had also complained repeatedly about plaintiff's prices, and the plaintiff had evidence that the defendant had explicitly threatened to terminate the plaintiff unless it raised its prices. *Id.* at ____, 104 S.Ct. at 1472.

Similarly, in the post-*Monsanto* cases we have reviewed, defendant was granted summary judgment or a directed verdict unless the plaintiff could prove more than complaints followed by termination. Absent proof of meetings among the alleged conspirators and price pressure on the plaintiff, the plaintiff's claim failed.

For example, in a recent Fourth Circuit case, the court affirmed a directed verdict for the defendant where, as here, pursuant to a new sales program, the defendant had terminated its relationship with the plaintiff dealer, and the plaintiff claimed that the defendant had succumbed to other dealers' price complaints. *National Marine Electronic Distributors v. Raytheon Co.*, No. 84-2019, 84-2026, slip op. (4th Cir. Nov. 27, 1985). The plaintiff presented substantial evidence that the defendant had in fact acceded to such complaints, and the district court found that the complaints had played a part in the defendant's deci-

sion to terminate the plaintiff. Nevertheless, citing *Monsanto*, the Fourth Circuit agreed that the plaintiff had failed to prove that the decision was not unilateral action on the part of the defendant. The court cited evidence that the defendant never told the plaintiff or any other dealer what price to sell its goods; rather, each dealer set his own retail prices:

> Raytheon's dealers competed with each other and with dealers who sold competing brands of similar products. This evidence refutes that charge that Raytheon conspired with one or more dealers to terminate National for the purposes of restraining price competition.

Id. at 8.

In a Second Circuit case, a discounting wholesale outlet alleged a conspiracy between a manufacturer and a retailer when the manufacturer decided no longer to sell its product to the wholesalers. *Burlington Coat Factory Warehouse v. Esprit de Corp,* 769 F.2d 919 (2d Cir. 1985). As evidence of the conspiracy, the plaintiff demonstrated that the retailer's president had made a speech in which he stated that it would no longer deal with manufacturers who sold to discounters; the plaintiff was terminated one month later; the manufacturer had failed to follow its internal guidelines in terminating the plaintiff and the retailer had pressured other suppliers not to sell to the plaintiff.

The court affirmed the district court's grant of summary judgment, holding that under *Monsanto,* this evidence was insufficient to demonstrate an issue of fact as to the existence of a conspiracy between the retailer and the manufacturer. The court noted that the plaintiff had offered no evidence that the retailer and the manufacturer had ever discussed the plaintiff's discounting, and that the defendant had produced evidence as to why it had terminated the plaintiff. *See also Terry's Floor Fashions v. Burlington Industries,* 763 F.2d 604 (4th Cir. 1985); *Reborn Enterprises, Inc. v. Fine Child, Inc.*, 590 F.Supp. 1423 (S.D.N.Y. 1984), *aff'd,* 754 F.2d 1072 (2d Cir. 1985).

Here, Valley has not demonstrated that Renfield ever met with Continental and/or Romano to discuss pricing or the possibility of realignment in general, or that Renfield ever pressured Valley to raise its prices. To the contrary, Valley's representative has admitted that Renfield never asked Valley to maintain a certain price level, and that he was not aware of any meeting among Continental, Romano and Renfield prior to Valley's termination.[3] Representatives from Continental, Romano and Renfield have all testified in depositions that no agreement was made. In further support of its motion, Renfield has demonstrated that no distributor was happy with the realignment: Romano was upset that, pursuant to the realignment, it lost exclusive right to sell a certain brand of wine, and Continental was equally disturbed because it lost its exclusive right to sell Gordon's Vodka in Cook County. Finally, prices did not in fact rise in McHenry, DuPage and Cook counties after Valley was removed.[4]

Valley contends that it nevertheless has proven the existence of a genuine issue of fact as to whether Renfield conspired to fix prices because of the following four pieces of evidence: (1) Valley sold Renfield's products at a price lower than other distributors; (2) distributors in general complained about other distributors' prices; (3) it was not rational, in Valley's view, to exclude Valley, since it was the most aggressive seller of Valley's products; and (4) sales of Renfield's product declined in McHenry, DuPage and Cook counties after Valley was excluded.

At most, Valley has demonstrated that Renfield exercised bad business judgment in its realignment. It has not shown that this business judgment was not independent. In light of Renfield's evidence of no meetings or other communication[5] among it and its other distributors prior to its decision to realign,[6] and its own plausible explanation for the realignment, Valley has not even demonstrated that Renfield's independent decision was based on Valley's low prices. Renfield never complained to Valley about its prices; the realignment was made statewide; and Valley's exclusion was only partial—Valley actually *gained* exclusive rights in five counties.

In fact, Valley has not even met the pre-Monsanto burden of proof, since the distributors' complaints upon which it bases its argument were not even directed toward Valley in particular. The evidence of distributor complaints upon which Valley relies is contained in the deposition testimony of several Renfield representatives. Each representative states that Romano and Continental did not complain singularly about Valley, but that *all* distributors, including Valley, complained about *every other* distributor—a situation the Court in *Monsanto* found typical and natural. *See Monsanto*, 465 U.S. at ___, 104 S.Ct. at 1470.

Even if we could regard the facts that Valley undercut other distributors' prices and that distributors generally complained as together meeting the pre-*Monsanto* complaint plus termination test, in the absence of evidence of joint activity beyond complaint and termination, this evidence fails to present a genuine issue of fact after *Monsanto. See Monsanto.* 465 U.S. at ___, 104 S.Ct. at 1472; *National Marine*, slip op. at 8; *Burlington*, 769 F.2d at 924.

Therefore, summary judgment is granted in favor of Renfield on Count I.

Count II—Unreasonable Restraint of Trade

If a plaintiff fails to prove a *per se* antitrust violation, he can still prove a § 1 violation under the Rule of Reason. While a supplier or manufacturer may not have conspired with his dealers or suppliers to fix prices, he has still violated § 1 if he has imposed restrictions upon his dealers or suppliers which unreasonably restrain trade. The required concerted activity is found in the contractual restrictions between the manufacturer or supplier and his dealer or distributor. Even if the dealers or distributors do not willingly agree to the restrictions, but only involuntarily acquiesce in a vertical imposition, such acquiescence amounts to the necessary concerted activity. *See* J. von Kalinowski, 2 *Antitrust Laws and Trade Regulation*, § 6C.02[2] at 6C-19-20 (1985).

Because the concerted activity does not amount to a conspiracy to violate antitrust law, however, courts do not presume harm to competition, and the plaintiff must prove that the vertical imposition—here, a geographical allocation—had an anti-competitive effect. The ultimate question is, does the restraint unreasonably suppress competition in the relevant market? *See National Society of Professional Engineers v. United States*, 435 U.S. 679, 691 (1978). Phrased differently, courts ask, was the consumer made "worse off" as a result of the defendant's anticompetitive conduct? *Valley*, 678 F.2d at 745.

Admittedly, these questions are not easy to answer, and, therefore, courts have developed tests to determine the answers. The first factor a court examines is whether the defendant had market power, that is, the power to raise prices significantly above the competitive level without losing his business. *See Hennessy Industries, Inc. v. FMC Corp.*, No. 85 C 1136, slip op. at 5 (7th Cir. Dec. 17, 1985) (assessment of market power "first step" in any Rule of Reason case); *Valley*, 678 F.2d at 745 (defining market power). If the defendant does not have market power, then the plaintiff automatically loses, because without such power the defendant is not likely to adopt policies that disserve its customers; if he does adopt such a policy, then market retribution will be swift and not threaten consumer welfare; and if the adoption of such a policy could threaten consumer welfare, this possibiliy is "too small to warrant trunding out the great machinery of antitrust enforcement." *Valley*, 678 F.2d at 745.

If a defendant does have market power, then the court balances the effect the restraint has on intrabrand and interbrand competition. *See Continental TV, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 57 n. 27 (1976); *Roland*, 748 F.2d at 395; *Valley*, 678 F.2d at 745. A supplier's geographical restriction, for example, reduces intrabrand competition: only a limited number of distributors sell "X" brand in a geographical market, thereby limiting competition in the sale of "X". But often this intrabrand limitation increases interbrand competition, because those dis-

tributors who are allowed to sell "X" can supply "X" more efficiently. *See GTE*, 433 U.S. at 54-55; *Graphic Products Distributors v. Itek*, 717 F.2d 1560, 1571 (11th Cir. 1983).

Applying these tests to the instant case, Valley's first obstacle becomes immediately apparent. Market power is "normally inferred from the possession of a substanial percentage of the sales in a market carefully defined in terms of both product and geography." *Valley*, 678 F.2d at 745. A "substantial percentage" in § 2 monopoly cases is at least five percent. *See Domed Stadium Hotel. Inc. v. Holiday Inns, Inc.*, 732 F.2d 480, 489 (5th Cir. 1984). Since the purpose of establishing market power is similar in § 1 and § 2 cases, that is, to determine whether the defendant can control the market, the percentage for § 1 market power should be somewhere in a similar range. Accepting for the purpose of this motion that Valley's definition of the geographical and product market is correct (DuPage, McHenry and Cook counties and distilled spirits and wine), Valley does not dispute that Renfield's market share is less than two percent. We fail to see how any conduct on Renfield's part could affect the market and make consumers worse off, given this minimal market share. If Renfield increased its prices significantly, the consumer would merely switch to another supplier in the market. Valley has indicated that Renfield is one of the larger liquor distributors in the nation, but this only demonstrates the intense competition in the field and Renfield's powerlessness to dictate prices in the market.

Valley attempts to overcome this obstacle by citing testimony from Renfield's representatives to the effect that if Renfield raised the price of one of its products $.50 to $1.00, Renfield would not lose all its customers. This testimony does not support the premise that Renfield has the power to raise its prices significantly above the competitive level without losing its business. The testimony is highly equivocal–one representative qualified his statements by stating that a price increase "could kill some brands" and that he would be "concerned that the consumer [would] walk away." Campagna Dep. at 107. We

have no evidence before us as to what a competitive price is for these products—perhaps a \$.50 to \$1.00 rise in price still keeps the product in a competitive price range. These statements are simply too tenuous to create an issue of fact as to market power in light of Renfield's conceded two percent market share.

Moreover, the concept behind this testimony appears to be that customers would demonstrate some minimal brand loyalty: they would accept a \$.50 increase before switching from a Renfield brand. But elsewhere, Renfield's representatives have testified that brand loyalty in distilled spirits is negligible, and Valley has not denied that consumers find one brand of gin or vodka highly substitutable with another.

Since Valley has failed to demonstrate that Renfield has the requisite market power, Valley's claim must fail. But even if we did proceed to the next step, Valley has failed to raise a genuine issue of material fact as to the anticompetitive effect of Renfield's geographic restriction.

Several Renfield representatives explained that their realignment program was designed to reduce intrabrand competition in order to increase interbrand competition. By reducing the number of its distributors, Renfield hoped to streamline its relationships and make its distributors more accountable for their sales of Renfield's products. If fewer distributors sold Renfield products, each distributor would have greater incentive to sell Renfield products and would concentrate on competing with other brands, not each other.

Valley argues that the restraint did have an anticompetitive effect because interbrand competition did not increase. It claims that this result is demonstrated by the fact that in the two years subsequent to Valley's exclusion from McHenry, DuPage and Cook counties, sales of Renfield's products decreased in that area. But this fact is meaningless in isolation. Valley has not tried to prove that Renfield products were ever made less available to the consumer as a result of its exclusion, or that consumers were faced with a higher price for Renfield prod-

ucts. In short, Valley has failed to demonstrate how consumers were made "worse off" by its exclusion. Renfield is entitled to summary judgment on Count II.

Count III—Breach of Contract

This count is dismissed for the reasons set forth in *Grand Light & Supply Co., Inc., v. Honeywell, Inc.*, 771 F.2d 672, 679 (2d Cir. 1985), and *Corenswet, Inc. v. Amana Refrigerators, Inc.*, 594 F.2d 129, 138 (5th Cir.), *cert. denied*, 444 U.S. 938 (1979). Valley's contract with Renfield specifically stated that Renfield had the right to terminate its relationship with Valley "at any time and for any reason." Therefore, there was no good faith requirement to terminate Valley only for cause. *See Loos & Dillworth v. Quaker State Oil Refining Corp.*, No. 01560 PHL 84, slip op. (Pa. Sup. Ct. Nov. 15, 1985).

Moreover, even under Valley's own interpretation of when a supplier may in good faith terminate a contract with a distributor, its claim fails. Under Valley's interpretation of the Uniform Commercial Code, a supplier may terminate a distributor only if he has a legitimate business reason to do so. Since Valley has not raised a fact question to support its contention that Renfield had an antitrust motive, nothing has contradicted Renfield's position that Valley was excluded pursuant to its legitimate business decision to realign its distributors statewide. Since the reason given by Renfield was "honest in fact," this also defeats any breach of contract action against it. *See Zapatha v. Dairy Mart, Inc.*, 381 Mass. 284, 408 N.E.2d 1370 (1980).

CONCLUSION

Renfield's motion for summary judgment is granted, and this case is dismissed with prejudice.

DATED: DEC 31 1985

ENTER: /s/ John F. Grady
United States District Judge

[1] In 1984, Continental lost the right to sell Renfield's product in McHenry, DuPage and Cook counties, making Romano Renfield's exclusive distributor in this area.

[2] Because the Court in *Monsanto* expressly rejected the Seventh Circuit's test in this area, we do not look to the Seventh Circuit's discussion in *Valley* for guidance.

[3] Renfield did meet with Romano and Continental separately prior to Valley's termination. See n. 6.

[4] Valley claims that prices had been falling, and after Valley's exclusion, prices stabilized.

[5] We realize, of course, that evidence of actual meetings and express agreement is unnecessary. Communication is all that is required, and this can occur in a variety of ways. The result may be simply a tacit understanding rather than an explicit agreement. Circumstantial evidence would be the usual method of proof.

[6] There were separate meetings between Renfield and each of its distributors prior to Renfield's announcement of the contours of the realignment. On July 17, 1981, Renfield met with each of its distributors separately and informed them that it planned to realign them. Valley has produced no evidence to suggest that these meetings were not what Renfield, Romano and Continental explained they were: unilateral notifications. The fact that Renfield met each distributor separately after it had decided to realign, and that every participant in these meetings has described the unilateral nature of Renfield's conduct negates any inference that a common scheme to fix prices was discussed among the alleged co-conspirators at that time. The July meetings were similar to the October meetings (and a September meeting with Romano) and there is no evidence that common understandings arose out of the July meetings. In fact, all evidence is to the contrary. For example, Continental was so upset as to its realignment in October, that its initial October meeting had to be cancelled in order that Continental could meet with Renfield's president, as Continental insisted. Memorandum in Support of Defendant's Motion for Summary Judgment, Exh. 3. If some common scheme had arisen out of the July meetings, Continental would not have been surprised and disturbed in October. Valley has not focused on these pre-October meetings to support its allegation of a conspiracy, see *supra* at p. 8, and it is easy to see why it has not: Renfield's conduct in announcing a realignment, meeting with each distributor separately, then announcing the contours of the alignment, supports an inference of unilateral action. When the Court in *Monsanto* and the post-*Monsanto* courts emphasized co-conspirator communications, obviously they meant communications that would support an inference of unity of purpose, for example, joint meet-

ings among the conspirators, or meetings held in secret, or meetings in which pricing was discussed. Since the meetings here, as Valley tacitly recognizes, do not suggest unity of purpose, but the contrary, they do not support Valley's position.

All the evidence as to Renfield-Romano-Continental meetings was presented to us in the preliminary injunction hearing, and we found, as here, that this evidence only supported Renfield's assertion of no conspiracy. Memorandum in Support, Exh. C. The Seventh Circuit agreed that the evidence presented at the hearing could not support an inference of a conspiracy to fix prices. *Valley*, 678 F.2d at 744. Valley has submitted no evidence regarding these meetings (or any other meetings) to change our conclusion.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

July 13, 1987.

Before

Hon. HARLINGTON WOOD, JR., *Circuit Judge*
Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. KENNETH F. RIPPLE, *Circuit Judge*

No. 86-1040

VALLEY LIQUORS, INC., an Illinois Corporation,

Plaintiff-Appellant,

vs.

RENFIELD IMPORTERS, LTD.,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 81 C 6285–John F. Grady, *Judge.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by plaintiff-appellant on June 17, 1987, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

Judge Frank H. Easterbrook did not participate in the consideration of this petition.

15 USCS § 1

§ 1. Restraint of trade; resale price maintenance, penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: Provided, That nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 5, as amended and supplemented, of the act entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914: Provided further, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.